

UTAH

AIR QUALITY BOARD

Meeting
June 1, 2005



Department of Environmental Quality
Division of Air Quality

File



State of Utah

Department of
Environmental Quality

Dianne R. Nielson, Ph.D.
Executive Director

DIVISION OF AIR QUALITY
Richard W. Sprutt
Director

Air Quality Board
John M. Veranth, *Chair*
Ernest E. Wessman, *Vice-Chair*
Jerry D. Grover
Scott Hirschi
James R. Horrocks
Dianne R. Nielson
Richard R. Olson
Wayne M. Samuelson
JoAnn B. Seghini
Marcelle Shoop
Jeffery K. Utley
Richard W. Sprutt,
Executive Secretary

JON M. HUNTSMAN, JR.
Governor

GARY HERBERT
Lieutenant Governor

DAQ-030-2005

UTAH AIR QUALITY BOARD MEETING

Work session will be held prior to discuss the **DAQ 101**
12 – 1 pm
168 North 1950 West (Bldg #2) Room 101

FINAL AGENDA

Wednesday, June 1, 2005
1:30 p.m.

168 North 1950 West (Bldg #2) Room 101

- I. Call-to-Order
- II. Date of the Next Air Quality Board Meeting: July 6 and August 3 at 1:30 p.m.
- III. Approval of the Minutes of April 13, 2005, Board Meeting.
- IV. Motions to Stay in IPP and Sevier Power appeals. Presented by: Fred Nelson
- V. Scheduling of Proceedings in IPP and Sevier Power appeals. Presented by: Fred Nelson
- VI. Modification of DAQE-AN1386012-04 by Adding Carbon Fiber Production Process Equipment Items. Presented by: Rusty Ruby
- VII. Propose for Public Comment: Amend R307-150 to Add Requirement to Report Emissions of Tertiary Butyl Acetate. Presented by: Jan Miller
- VIII. Propose for Public Comment: Amend R307-101-2, Definition of "Clearing Index." Presented by: Tyler Cruickshank
- IX. Informational Items.
 - A. Election of Board Chair and Vice Chair. Presented by: Rick Sprott
 - B. Power Forward Program. Presented by: Rick Sprott
 - C. Compliance. Presented by: Jeff Dean
 - D. HAPS. Presented by: Bob Ford
 - E. Monitoring. Presented by: Bob Dalley



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 - C. HAPS: (Bob Ford)
 - D. Monitoring: (Bob Dalley)

MINUTES

UTAH AIR QUALITY BOARD MEETING
June 1, 2005
MINUTES

I. Call to Order.

John Veranth called the meeting to order at 1:35 p.m. He welcomed Mr. Stead Burwell, a new Board member.

Board members present:

Nan Bunker	Jim Horrocks	Marcelle Shoop
Stead Burwell	Wayne Samuelson	John Veranth
Jerry Grover	JoAnn Seghini	Ernest Wessman

Executive Secretary: Richard W. Sprott

II. Next Meeting.

July 6, 2005, August 3, 2005, and September 7, 2005.

III. Minutes.

Page 1, item III. Minutes, reword the approval of the minutes to read: • "Mr. Wessman moved that the minutes be approved as corrected."

Page 3, paragraph 7, there was a question on the motion that Wayne Samuelson moved on. The motion is to set the schedule for this meeting. It should read: "Wayne Samuelson moved to set the schedule at the June 1, meeting."

Page 4, paragraph 3 and 5, Ms. "Joro" should be Ms. "Walker."

Page 4, paragraph 4, reword the sentence to say: "Ms. Walker stated that the request was that the proceeding of IPP and Sevier Power matters should both be stayed."

Page 5, item VII. Informational Items, paragraph 2, first sentence which states: "...articles in the newspaper concerning mercury emissions from coal mines," the word "coal" should be "gold" mines.

- Ernie Wessman moved to approve the minutes as corrected. Wayne Samuelson seconded. JoAnn Seghini abstained and the rest of the Board approved unanimously.

IV. Motion to Stay in IPP and Sevier Power Appeals. Presented by: Fred Nelson.

John Veranth introduced Fred Nelson from the Attorney General's office. Mr. Nelson stated that in 2004, the Executive Secretary issued a permit to build IPP Unit #3 and the Sevier Power Company to build a coal-fired power plant down by Sigurd. The Sierra Club appealed both permits and the Sevier Citizens appealed just the Sevier Power Company permit. The Board approved and granted the petition of the Sevier Citizens Group to intervene. The Board heard the motions to intervene by the Sierra Club in both

the Sevier Power Company permit and the IPP Unit 3, and denied both motions. Sierra Club has filed motions with the Appellate Court on the Board's decision not to allow the club to intervene in IPP and Sevier Power. The Sierra Club is asking the Board for a motion to stay the proceedings in the IPP matter and a motion to stay the proceedings in the Sevier Power Company matter until the Appellate Court makes a decision. Mr. Nelson introduced the four parties who were involved with this motion. The four groups, the Sierra Club, IPP, Sevier Power Company and the Executive Secretary gave brief presentations to the Board.

Ernie Wessman recused himself from the entire agenda item. A transcript of this action item is attached for the Board. The motions for this item are included below.

- Jim Horrocks moved that based on the four criteria items that the Sierra Club needed to satisfy, he did not believe they had met the criteria. Therefore, he moved that the Board deny the Sierra Club's motion to stay on both the IPP and the Sevier County Power Plant. JoAnn Seghini seconded. Those in favor: Jim Horrocks, Wayne Samuelson, Jerry Grover, JoAnn Seghini, Marcelle Shoop, and Nan Bunker. Opposed: Stead Burwell. Not Voting: John Veranth. Ernie Wessman recused himself.

V. Scheduling of Proceedings in IPP and Sevier Power Appeals. Presented by Fred Nelson.

- Jerry Grover moved that the proceedings in the IPP Appeals continue until the parties involved set a date to bring the matter before the Board. The motion was seconded. The Board approved unanimously.
- Jerry Grover moved that the proceedings in the Sevier Power Appeals continue until the parties involved come back to the Board next month. Wayne Samuelson seconded and the Board approved unanimously.

VI. Modification of DAQE-AN1386012-04 by Adding Carbon Fiber Production Process Equipment Items. Presented by: Rusty Ruby.

Mr. Ruby explained that the Hexcel Corp. had requested a modification to establish a new carbon fiber production process line at the West Valley Plant. The new equipment will increase the State Implementation Plan (SIP) listed potential to emit limits associated with their operation. They have also requested to modify the SIP listed production limits. However, the emissions from the source would be below the threshold for the new proposed PM10 maintenance plan so it would no longer be a SIP source. During the public comment period, no comments were received. The staff recommends that the Air Quality Board approve this request for this modification.

- Ernie Wessmen moved that the Board approve the modification. Marcelle Shoop seconded. The Board approved unanimously.

VII. Propose for Public Comment: Amend R307-150 to Add Requirement to Report Emissions of Tertiary Butyl Acetate. Presented by: Jan Miller.

Ms. Miller reported that at the April Board meeting there was a proposed rule change that defined volatile organic compound (VOC) to excluded 5 compounds, one of which was

called Tertiary Butyl Alcohol (TBAC.) Staff was asked why inventory information was not being collected separately on TBAC. After discussion, staff has drafted a rule for the Board's consideration. This rule would go into inventory rule and not definitions. Currently, EPA is working on a revision and is expected to make a change later this year to its methodology for determining what substance should be exempted from the definitions of VOC. Also, there are no sources that would be reporting if they were required to do so. Staff recommends that the Board wait until the new EPA rule is in place.

- Ernie Wessman stated that given the fact that there are no sources that are adding any TBAC in the state, it is recommend that the Board accept the staff's recommendation and not accept the change in the language at this time. Nan Bunker seconded and the Board approved unanimously.

VIII. Propose for Public comment: Amend R307-101-2, Definition of "Clearing Index."
Presented by: Tyler Cruickshank.

Mr. Cruickshank explained how the Clearing Index worked. It describes how well a pollutant or smoke is released from the ground level and disperses in the air. It is calculated using the forecast mixing height and wind speed within the lower atmosphere. For example, a low mixing height would create an inversion. A higher mixing height disperses smoke more efficiently. The Clearing Index is an important criteria in the open burn rule and some approval orders.

In the early 1970's, the Division of Air Quality and the National Weather Service formulated the Clearing Index. Three air sheds were identified in the state. The western and eastern sides, and all elevations above 6,000 feet. With improved technology in computer forecasting by the National Weather Service, the state can now be divided into 2.5-kilometer grids. The new system will maximize burning opportunities, but will minimize the impact on air quality at the same time. Staff has made a web site available, and the National Weather service would maintain the site.
(www.airquality.utah.gov/presentation/boardMeetingCI-large.htm)

- Ernie Wessman moved to propose for public comment to amend R307-101-2, Definition of "Clearing Index." JoAnn Seghini seconded and the Board approved unanimously.

IX. Informational Items:

- A. **Election of Board Chair and Vice Chair:** Presented by Rick Sprott.
Feed back from Board members indicated that July would be an acceptable month for elections.
- B. **Power Forward Program:** No questions.
- C. **Compliance:** No questions.
- D. **HAPS:** No questions.
- E. **Monitoring:** Presented by Bob Dalley.
The graphs in the packet showed no exceedences.

JoAnn Seghini mentioned that she was impressed with the newspaper article on the ozone and the degree of technology that allows more sensitivity to the needs of people. Mr. Spratt responded that Mr. Dalley and his people were responsible for that.

Meeting adjourned: 3:45 pm

1 JUNE 1, 2005

1:41 P.M.

2 P R O C E E D I N G S

3 THE CHAIR: We are now to Item 4. Motion to
4 Stay in the IPP and Sevier Power appeals. Fred Nelson.

5 MR. WESSMAN: Mr. Chairman, because of my
6 involvement with PacifiCorp, I'll have to recuse myself
7 from the discussion.

8 THE CHAIR: Thank you.

9 MR. NELSON: The -- just to remind the Board
10 the status of this matter. Several months ago, in the
11 fall of 2004, the Executive Secretary issued a permit to
12 IPP to build Unit No. 3. And also a permit to Sevier
13 Power Company to build a coal-fired generation power
14 plant down by Sigurd.

15 Those permits were appealed to the Board by
16 the Sierra Club and by a citizens' group. Sierra Club
17 appealing both permits, and the citizens' group
18 appealing just the Sevier Power Company permit.

19 Part of the rules of the Board is that the
20 Board is required to grant intervention and establish
21 standing for parties in order to proceed. And the Board
22 heard the motions to intervene -- of the Sierra Club to
23 intervene in both the Sevier Power Company proceeding
24 and the IPP proceeding, and the Board denied those
25 motions. And orders were issued with respect to those.

1 The Board also granted the -- approved and
2 granted the petition to intervene in the Sevier
3 Citizens' Group. At the time that the orders were being
4 considered by the Board, the Sierra Club filed motions
5 to stay. Motions to stay the proceedings until they
6 have appealed the decision on the petitions to intervene
7 to the appellate court.

8 The Sierra Club has filed those petitions to
9 have those decisions of the Board reviewed. And is now
10 before the Board to ask that they -- the Board stay
11 proceedings until that review has happened. So that,
12 that is the issue today.

13 There, there are two motions. The motion
14 stay the proceedings in the IPP matter. And the second
15 motion is the motion to stay the proceedings in the
16 Sevier Power Company matter.

17 My suggestion to the Board is that we handle
18 this consistent with the way we did the motions to
19 intervene. That you've had the pleadings, and you've
20 had a chance to review those pleadings. There are four
21 interested groups in this matter: There's the Sierra
22 Club, IPP, Sevier Power Company, and the Executive
23 Secretary.

24 Those are the four that filed pleadings.
25 And my suggestion is is that you hear a short oral

1 description of the important points that they feel is
2 appropriate, and then you proceed to make a decision on
3 those motions to stay.

4 As far as an order, it would be appropriate
5 to have the Sierra Club go first, followed by Sevier
6 Power Company, and IPP, and then finally with the
7 Executive Secretary. And then if there are any
8 questions of the Board or comments, you can deal with
9 those at that point.

10 THE CHAIR: All right. Ms. Walker, would
11 you like to come up?

12 And for the benefit of the court reporter,
13 we all need to be -- attempt to speak clearly and
14 distinctly. And if you are having trouble hearing or if
15 the microphones aren't working, please just flag and
16 I'll ask to have it repeated.

17 THE COURT REPORTER: Thank you.

18 MS. WALKER: I'm Joro Walker, representing
19 the Sierra Club and the Grand Canyon Trust. Fred, how
20 long do I have, and can I reserve time for rebuttal?

21 MR. NELSON: Well, I used the word "short"
22 hoping we -- we did 10 minutes before, when we had
23 extensive pleadings. I don't know. The Board probably
24 needs to set -- if you want to set a time, you can. Or
25 you can just rely on counsel to be appropriate. It's up

1 to the Board.

2 THE CHAIR: Rely on people to be
3 appropriate?

4 MS. WALKER: Okay, appropriate. Do I have
5 time for rebuttal, though?

6 MR. NELSON: That would be, that would be
7 what would be normally an appropriate process.

8 MS. WALKER: Okay. Okay, thank you. To be
9 clear, and I think Fred explained this well, is that
10 we're asking for the two proceedings to be stayed while
11 our appeal -- or our petition is heard by the Court of
12 Appeals. The State Court of Appeals.

13 As you are aware, there's a, a four-part
14 test that are written into the rule -- the relevant
15 rules that's been given to you by every party. So I'm
16 going to explain the factors that I think suggest that
17 there's a compelling reason, under that four-part test,
18 that you stay those proceedings.

19 And the first one is that it's the job of
20 the Utah courts to determine standing. As, as the
21 appellate court has said, it has the duty and power to
22 say what the law is, and to ensure that it's uniform
23 throughout the jurisdiction.

24 And you have probably never heard of
25 "standing" before three or four months ago. And, as y

1 realized when you were trying to apply it, it's not all
2 that easy a concept to apply. And therefore the most
3 prudent thing may well be to realize that the courts
4 have the expertise to determine standing. And to stay
5 this proceeding, and give them a chance to figure out
6 what's going on.

7 The second reason, and another reason why
8 this issue should be given to the courts to grapple
9 with, is because the Clean Air Act requires access for
10 groups like the Sierra Club to judicial and
11 administrative proceedings. As the EPA has said:

12 "All affected members of the public must
13 be allowed to challenge PSD determinations."

14 And as you recall, this proceeding is about
15 a PSD permit. The statement made by the EPA in the
16 *Federal Register*, which was recently referenced by the
17 United States Supreme Court, in a dissent states that:
18 State implementation plans, including those parts
19 dealing with PSD permits, must provide that all affected
20 members of the public be allowed to challenge those
21 permits.

22 And in Utah, remember, there's two
23 situations that mean that that, that statement applies
24 to this Board. The first is that all parties -- all
25 entities must exhaust their administrative remedies. So

1 if you deny Sierra Club access to this proceeding, you
2 are essentially denying them access to the state courts.

3 And the other reason is is that the
4 standards are the same. As you recall, in your own
5 rules it says that the standards are those established
6 under Utah law by the Utah courts.

7 And this is what EPA said: The EPA
8 interprets the existing law and regulations to require
9 an opportunity for state judicial review -- review, I'm
10 sorry, of a PSD permit action under approved PSD SIPs by
11 permit applicants and affected members of the public in
12 order to ensure an adequate and meaningful opportunity
13 for public review and comment on all issues within the
14 scope of the permitting decision, including
15 environmental justice concerns and alternatives to the
16 proposed source.

17 The EPA believes that an opportunity for
18 public review and comment, as provided in the statute
19 and regulations, is seriously compromised where an
20 affected member of the public is unable to obtain,
21 obtain judicial review of an alleged failure of a state
22 to abide by its PSD SIP permitting rules. Accordingly,
23 all such persons, as well as the applicant, must be able
24 to challenge a PSD permitting action in a judicial
25 forum.

1 And later in the same statement the, the EPA
2 goes on to say it believes that Congress intended such
3 an opportunity for state judicial review of PSD permit
4 actions to be available to permit applicants, and at
5 least those members of the public who can satisfy
6 threshold standing requirements under Article 3 of the
7 Constitution. And that means the United States
8 constitution.

9 And based on EPA's analysis of Virginia's
10 proposed SIP, it determined that Virginia did not allow
11 sufficient judicial -- public review processes, public
12 access to the judicial courts -- to the state courts,
13 I'm sorry. And therefore refused to review Virginia's
14 SIP -- I'm sorry, refused to approve Virginia's SIP.

15 So the conclusion from this is that, again,
16 the expertise of the Utah courts is necessary because
17 more than just the permits before this Board is at issue
18 here.

19 Third, the Sierra Club will be harmed
20 significantly if this proceeding goes forward without
21 it. The Board will make decisions. All sorts of
22 decisions. And the parties will undertake all sorts of
23 activities as this proceeding goes forward. And the
24 Sierra Club won't be a part of them.

25 The longer this goes on, the more prejudiced

1 the Sierra Club is gonna be. These types of decisions
2 and activities include discovery, motion practices,
3 motions, advocacy on any of the issues that might arise
4 in the course of pretrial preparation of the case. And,
5 ultimately, the trial preparation itself. Including
6 direct and cross examination of witnesses at trial, and
7 the opportunity to present testimony and evidence at
8 trial at their own initiative.

9 And these decisions matter. As everyone
10 knows, getting in at the ground level is critical if you
11 are going to influence decision makers. No one wants to
12 wait until the last minute to give their take on a
13 particular issue.

14 In other words, once the proceeding goes on,
15 and the longer it goes on, the more difficult it will be
16 to backtrack, and to unscramble the egg, and allow the
17 Sierra Club a fair opportunity to participate in the
18 proceeding.

19 The fourth is the issue of efficiency. If
20 the Sierra Club is successful, the proceeding is gonna
21 have to start over. There's gonna be new discovery.
22 There's gonna be new schedule. There's gonna be -- new
23 depositions will have to be taken. New issues before
24 this Board.

25 And essentially the public servants involv

1 in the decision making, their time will be reused and
2 retaken up as these issues are redone, as well as the
3 time of this Board. The public will not be served by
4 such a rehashing of the issues before this Board.
5 Rather public -- the, the public good will be served by
6 delaying the process until the Sierra Club can
7 participate fully in the proceeding.

8 And fifth, there's no strong arguments to
9 suggest that waiting will harm anyone. It's merely a
10 delay of the process. And none of the arguments put
11 forward by any of the parties suggest otherwise.

12 You've been presented with the argument that
13 Sierra Club doesn't have standing to ask for a stay of
14 the very proceeding that they were denied participation
15 in. Now, this argument makes no sense, because the
16 whole idea behind a request for a stay is that the party
17 that lost has an opportunity to appeal. That the
18 fairness of that appeal is preserved by staying the
19 proceedings, because to do otherwise would unfairly
20 prejudice them. And third, that the decision may be
21 wrong.

22 That's the whole premise, that the decision
23 may be wrong. So if you assume the, the premise that
24 the decision may be wrong is invalid, you are
25 undermining the rule. So in other words if you say,

1 "Well, we're gonna assume that our decision is right,
2 and therefore that you don't have standing to proceed,"
3 well, that's undermining the very notion of the stay to
4 begin with.

5 There's this issue of whether an amicus is
6 good enough. And therefore, somehow, the Sierra Club
7 won't be harmed, because it's allowed to participate as
8 an amicus but not as a full party. And as, as I already
9 pointed out, all the activities and the decisions that
10 the Board will be making as this procedure -- as this
11 process goes forward, that, in that context, full-party
12 status is very different than amicus status.

13 For example, without status -- this
14 full-party status, as you've already seen, the Sierra
15 Club has been excluded from scheduling matters. Already
16 that decision has been made by this Board. We -- Sierra
17 Club can't make motions. We can't participate in
18 discovery. We can't advocate on the issues that arise
19 in pretrial preparation. And ultimately, we can't
20 participate in public -- I mean, I'm sorry, in the
21 trial. In preparation for the trial.

22 In addition, particularly in the SPC matter,
23 we raised a lot of issues that were not raised by the
24 citizens' group. Those issues won't be addressed at
25 all. And, therefore, amicus status won't be anything

1 like full-party status.

2 So just to sum up, I think that the, the
3 fact that the courts are in a better position -- are in
4 the best position to address this matter. That this
5 matter does raise, as the fourth factor suggests,
6 presents serious issues on the merits. That should be
7 the subject of further adjudication by the courts, who
8 are in the best position to do so.

9 And based on that, and based on the harm
10 that will occur to the Sierra Club, and the lack of harm
11 that will occur to anyone else, and the public interest
12 in not redoing this proceeding should the Sierra Club be
13 successful in their appeal, favors a stay in both
14 proceedings. Thank you.

15 THE CHAIR: Mr. Finlinson?

16 MR. FINLINSON: I'm Mr. Finlinson,
17 representing the Sevier Power Company. Just to start
18 out initially, the -- Counsel has just encouraged you
19 not to -- basically, to turn over your decision-making
20 process to the court. Apparently you don't have the
21 ability to make those standing decisions.

22 And yet your rules require you to deal with
23 the issue of standing. Your rules set forth that, that
24 that standing is supposed to be governed by the, the
25 Utah case law dealing with standing. And you have that

1 responsibility to make that decision. If you go ahead
2 and approve it, then I just think that she might finally
3 suggest that you don't have the authority to approve; we
4 ought to have that reviewed by the court as well.

5 I think you have that obligation to make
6 that decision. And the review at the circuit court by
7 the Court of Appeals is one on the record that you've
8 looked at. They don't bring in new evidence. And the
9 court has to conduct a review, really, to determine
10 whether or not your decision was arbitrary or
11 capricious. Or that it wasn't supported by any of the
12 evidence upon which was presented to you. And you
13 basically ran away with a decision and didn't pay
14 attention to the Utah law.

15 That's a pretty tough standard for the
16 appellates to, to meet. And so I think you need to
17 remember that and keep that in perspective. We think
18 that if a party lacks standing to, to require the review
19 of a permit, they probably don't have enough standing to
20 ask you to stop the review of that process.

21 That's basically what's happened in this
22 case. I'm not sure that you can be a party without
23 standing. The issues of staying are pretty much a very
24 guarded option that's available during an appellate
25 process. It's not granted very easily. There's a very

1 difficult four-part test. You have to meet every one of
2 the four parts in order to be justified, based on your
3 own rules, which are consistent with the rules of our
4 judicial system.

5 Stay is not really a very favored option.
6 They're not granted lightly by the courts, and shouldn't
7 be granted lightly by this Board. Even if they had the
8 standing to make the suggestion to request the stay, we
9 submit to you that they failed to meet the four-part
10 test.

11 They talked about irreparable harm. But
12 what is the harm that's gonna be suggested in a hard --
13 part of the system. And your actions are done in
14 public. And they have that issue. And we submit that
15 they fail to meet them. They talk that -- they have to
16 convince you, or the court, that the injury to the
17 Sierra Club is gonna be far more irreparable than the
18 injury to the project. Or to the state in its
19 regulatory process.

20 They're basically requesting that this body,
21 the Board of Air Quality, stop whatever you are doing
22 until the court makes a decision on standing. That
23 could run anywhere up to 18 months. And so your work on
24 what you are trying to accomplish as your administrative
25 responsibility has to come to a halt.

1 The carrying cost of a \$500 million project
2 a capital project, for a year's worth of just sitting
3 still is pretty significant. And I think that that far
4 outweighs the harm that would be cost to the Sierra
5 Club.

6 The question of whether or not it's adverse
7 to the public interest. If the public's interest is
8 having an abundance of renewable or energy that is
9 available that is driven by a legitimate process, that
10 public interest will be adverse to the decision of, of,
11 of holding that.

12 And the fourth standard is to look at
13 -- they have to show that they have a substantial
14 likelihood that they'll win. And you have looked at the
15 case law, you've heard the testimony, and you've made a
16 decision that they don't have standing.

17 That decision will go to the, to the Circuit
18 Court of Appeals. They'll have to decide whether or not
19 you erred in making that decision. That the evidence
20 that you heard doesn't support your ruling. I submit to
21 you that the evidence was submitted, and will justify
22 that your decision was an appropriate decision. I don't
23 think that there's a slam dunker that they're likely to
24 prevail in that part.

25 And then there's a third item that I want

1 you to look at. And this is that in the judicial
2 system, when you go and ask for a stay while you take a
3 matter upon appeal, they have a rule in civil
4 procedures, Rule 62. And it's a process that sets a, a
5 filing that they have to put up, a bond, a supercilious
6 bond, to protect the person who won on the, you know,
7 who's being appealed. That judgment is being appealed.

8 And that appeal -- or the cost of that bond
9 for a \$500 million project, or probably an even greater
10 amount for the Intermountain Power Project because their
11 client was gonna be bigger than ours, that cost is
12 pretty expensive to put up that kind of a bond. If the
13 Sierra Club can convince you to stop your state process,
14 that prevents us from the protection of the supercilious
15 bond.

16 And the -- and so by, by granting -- because
17 you don't have a rule in, in your process that allows
18 you to put up a bond in case they don't prevail. The
19 court system does. So if the Sierra Club can convince
20 you to do that, they get a stay that stops you, without
21 the benefit of a bond to protect the other parties like
22 they would in the court system.

23 So I -- we would urge you that, one, that
24 their petition for you to stay should be denied, based
25 on those issues that we've submitted.

1 MR. BURWELL: Mr. Finlinson, I, I'm new to
2 the Board. Can you describe briefly who Sevier Power
3 Company is?

4 MR. FINLINSON: Sevier Power Company is a
5 holding company owned by another company by the name of
6 NEVCO. They're -- they -- their offices are in
7 Bountiful. They're the ones that have put together the
8 project. They've acquired the options for the land, the
9 options for the water. And developed and done the air
10 monitoring. And submitted the application for the
11 approval, which was granted by the, the Secretary.

12 MR. BURWELL: And how big of a project is
13 it?

14 MR. FINLINSON: It would be about a
15 \$500 million project. It's a 270 megawatts net
16 generating facility. It uses coal, but it uses a
17 circulating fluidized bed technology instead of the
18 pulverized coal process that the power plants for Utah
19 Power & Light, over the mountain in Huntington, Utah.

20 So it's, it's a pretty clean process. It's
21 a 270 megawatt net production. We probably have about
22 250 megawatts that would be available for sale.

23 MR. BURWELL: And when are you scheduled to
24 begin construction?

25 MR. FINLINSON: We're not gonna start until

1 we have a permit. So we -- you don't, you don't get
2 down that road until you have a permit. In fact, the
3 permit is the approval to construct, I think is the
4 technical name of the permit.

5 So until this issue is resolved, that
6 project is really kind of on a hold. As would any other
7 project. Because in your regulatory capacity you have
8 that assignment to make sure that, whoever the applicant
9 is, that they line up with the requirements of the Clean
10 Air Act to be entitled to receive a permit. Thank you.

11 MR. HALEY: Good afternoon. I'm George
12 Haley, I represent IPA. And I have with me Lance Lee,
13 who is the individual at IPA who's responsible for coal
14 procurement. And I'd like to have him just use part of
15 my time. I'll be brief.

16 I agree with what Mr. Finlinson said in
17 terms of laying out the standard. I just have a couple
18 of additional comments, and I won't repeat what he has
19 said. But the rule that's at, at play here and controls
20 your decision is R307-103-10. And it places, on the
21 party who is seeking the stay, the burden of
22 establishing all four of those elements that you already
23 heard us talk about.

24 And I would submit, you don't have to go
25 beyond the first one. And the first one is that the

1 party seeking the stay will suffer irreparable harm
2 unless the stay is issued. And, of course, the reason
3 behind the denial of their standing is the Sierra Club's
4 failure to prove any palpable injury to a point of
5 establishing standing. Which is a lower standard than
6 irreparable harm would be.

7 The other point I want to make is these four
8 standards that are articulated in that rule are
9 essentially the preliminary injunction standard that you
10 have in court. They've kind of taken it from a long
11 body of case law in the Rules of Procedure and plugged
12 it into the Administrative Rules.

13 The one thing that's not there is this
14 bonding issue that Mr. Finlinson mentioned. And I would
15 submit that that is a good reason why the motion to stay
16 should be denied. If it's denied, the Sierra Club has
17 the clear remedy to seek a stay in the Court of Appeals.
18 They've already filed their appeal. So really the --
19 already the Court of Appeals has jurisdiction.

20 And there's a rule precisely on point, which
21 is Rule 17 of the Rules of Appellate Procedure, that
22 says if an application in front of a board like this is
23 denied, and the motion for stay is denied, they can seek
24 redress in the Court of Appeals. And the Court of
25 Appeals can consider whether or not a bond should be

1 issued.

2 Which, I think, is the fairest way and the
3 most sensible way to proceed. Because the other element
4 that they will not be able to establish is that, in
5 terms of weighing the damages, that the damage is so
6 much higher for IPA than it would be the Sierra Club.

7 And I'm gonna have Mr. Lee just briefly tell
8 you some of the analysis he has made on what the cost of
9 delaying this for some year and-a-half, two years, who
10 knows? Once, once an appeal is taken, it's an
11 indefinite period of time.

12 MR. LEE: Mr. Haley asked me to spend a
13 brief moment here and discuss -- go briefly with you an
14 analysis -- quick analysis that I did on potential harm
15 that could be -- come to the project if a delay is
16 incurred.

17 As you are well aware, our price of energy
18 has went up over the last few years. In particular coal
19 has increased in the price, over the last two years,
20 about 30 percent per year. So by delaying the project
21 it has a huge impact on potential to cost this project
22 tens of millions of dollars. Especially when you are
23 talking on order of 3 million tons a year.

24 The financial community quite possibly could
25 require us to enter into long-term agreements. And if

1 you delay that and the price of coal moves up further,
2 as it has in the past, it could literally cost us
3 hundreds of millions of dollars.

4 Interest rates have been low these past few
5 years. Our analysis has taken in account some inflation
6 of those interest rates. But as we have seen in the
7 past couple years, interest rates continue to creep
8 upwards, not downwards. So there is very real harm that
9 can be caused to this project by delaying it.

10 I would go more into cost of the coal,
11 but -- and exact contracts that we have to prove where
12 price of coals went, but we have confidentiality clauses
13 in our agreements that don't allow me to discuss --
14 disclose those.

15 MR. HALEY: Thank you. But I think that
16 really makes the point in terms of weighing what would
17 be the relative harm on a, on a stay that -- it's clear
18 that it could have the impact of at least tens of
19 millions at a minimum, to hundreds of millions of
20 dollars to this project.

21 Which would have a corresponding increase in
22 the price of power that's gonna be generated out of that
23 project, which is not in the public interest to increase
24 the price of power. There's also the need of power, and
25 delaying that over time as you are looking forward.

1 The, the west is growing rapidly, and there's an
2 increasing need to have power generation.

3 So I, I would argue that the Sierra Club has
4 wholly failed to meet its burden of establishing really
5 any of the four points. But they only need to fail to
6 establish one of the four points in order for the denial
7 to be appropriate.

8 And then, again, I would just say that the
9 Board got it right in its order of, of May 12th. That
10 the Sierra Club has appealed it. At this point, I think
11 the appropriate thing to be is let the Court of Appeals
12 deal with this issue.

13 If they think they should have a stay, let
14 them argue it in the Court of Appeals. Let us argue
15 what the appropriate bond would be. Because you
16 shouldn't just be able to come in, and for a piece --
17 price of a piece of paper be able to cost my client tens
18 or hundreds of millions of dollars.

19 They ought to be able -- they ought to be
20 forced to post a bond to cover what our harm would be if
21 their appeal is unsuccessful. Which we, of course,
22 strongly believe that it will be, just as the Board
23 found in its May 12th order that there wasn't a legal
24 basis for standing.

25 And as what the arguments that Ms. Walker

1 made about the EPA's position. The EPA, with all due
2 respect, what their view is is not controlling on this
3 Board, nor the courts of the State of Utah. That's
4 controlled by the Utah Supreme Court. Which was the
5 basis of the decision -- those decisions that we argued.

6 And with that, I'll submit it. I think the
7 motion should be denied. Thank you.

8 MR. BURWELL: Can you, can you describe the
9 company that you are representing and, and what's the
10 background of that company?

11 MR. HALEY: The IPA is a quasi-governmental
12 entity. It's in Millard, Utah. It has -- or Delta,
13 Millard County. It has two existing units. We've
14 petitioned to build a third unit on the same side.

15 MR. BURWELL: What does "quasi-government"
16 mean?

17 MR. HALEY: It was set up by the State of
18 Utah. It has governmental immunity. It's --

19 MR. BURWELL: Well, is, is IPA an acronym?

20 MR. LEE: Intermountain Power Agency.

21 MR. BURWELL: Okay.

22 MR. LEE: It's a political subdivision of
23 the State of Utah.

24 MR. BURWELL: Are there any private
25 shareholders of IPA?

1 MR. LEE: We don't have, I don't think, any
2 shareholder -- shareholders.

3 MR. BURWELL: And how, how many employees do
4 you have?

5 MR. LEE: At the power plant there are
6 approximately 500 employees.

7 MR. BURWELL: Okay, thank you.

8 MR. HALEY: Anything else? Thank you.

9 MS. SHOOP: Mr. Chairman, will we be allowed
10 to ask some other questions once everybody else is
11 finished?

12 THE CHAIR: Yeah.

13 MS. SHOOP: Thank you.

14 MR. STEPHENS: Good afternoon, my name is
15 Christian Stephens. Mr. Richard Rathbun and I are
16 assistant attorneys general, we represent the Executive
17 Secretary. We appreciate the opportunity to address the
18 Board this afternoon.

19 And what we are dealing with here is really
20 comes down to a question of eligibility. The other
21 parties, Ms. Walker, Mr. Finlinson, and Mr. Haley, I
22 believe have done an adequate job of educating the Board
23 on the various requirements of the rule. These are the
24 requirements that must be satisfied in order to be
25 eligible for a stay.

1 So briefly I would just like to point out
2 few of the issues with respect to how this rule
3 governing the, the granting or the denial of a stay
4 applies to this situation from the perspective of the
5 Executive Secretary.

6 By its terms the rule requires, as the other
7 parties have said, that all four elements of the rule
8 must be satisfied. And the failure to satisfy even one
9 is fatal to the request of a stay. But it's also worth
10 pointing out that the granting or denial of a stay is
11 discretionary with the Board.

12 The rule says that the Board may deny -- may
13 deny or may for -- I guess a better way to say it would
14 be may grant a stay if those elements are satisfied.
15 But there is no obligation, even if all the elements are
16 satisfied, for the Board to grant the stay.

17 Just briefly, to, to cover the four elements
18 of the rule from the perspective of the Executive
19 Secretary. Sevier Power, in the case of the Sevier
20 Power appeal, Sierra Club has been granted amicus
21 status. They will be able to participate, albeit not as
22 a full party.

23 They will partic -- they have participated
24 in both the Intermountain Power and Sevier Power appeals
25 for, for the notice of intent stage of the permits --

1 approval orders. They submitted extensive comments.
2 They were at the hearings down in Millard County and
3 Sevier County.

4 Their viewpoints and their issues have been
5 raised to the Division. The Executive Secretary, when
6 he made the decision to issue the permits, factored in
7 the information that was submitted and the arguments
8 that were raised by the Sierra Club. So the arguments
9 have been raised.

10 I think it's worth pointing out also, as
11 Mr. Haley said, the Sierra Club, in the, in the eyes of
12 this Board, was not able to convince the Board that they
13 were harmed enough to have standing. Which is a lower
14 standard. They -- it would be hard to argue that
15 they're being harmed on a higher -- to a higher degree,
16 rising to irreparable harm, to grant the stay.

17 In fact, Sierra Club's own motion seems to
18 suggest that there may not be any harm at all. Sierra
19 Club mentions that there will be harm to the environment
20 if the permits are issued and all and these plants are
21 allowed to be built. But they also say that there won't
22 be any harm to the other parties because the plants
23 aren't going to be built anytime soon.

24 Which just begs the question of why a stay
25 is necessary if the plants, which would presumably,

1 according to the Sierra Club, emit more pollutants, the
2 very harm they fear, if the plants aren't going to be
3 built anytime soon, or at least before the Court of
4 Appeals makes a decision on their standing denials, why
5 there is any need for a stay at all.

6 Secondly, as a related matter, the alleged
7 threat of injury to the Sierra Club does not outweigh
8 the damage to the Executive Secretary. This is an
9 important point to the Executive Secretary and the
10 Division of Air Quality. Sierra Club is not yet a party
11 to these proceedings. Non-parties should not be
12 permitted to use an administrative stay, which is what
13 they're asking for here, to interfere with the ability
14 of the parties to these appeals to seek a resolution of
15 their dispute.

16 It's very likely that if the stay is granted
17 Sierra Club will argue not only that the existence of
18 the stay enjoins the parties from taking any action
19 formally before the Board, but it would also allow them
20 to -- in effect to veto any discussions of settlement
21 among the parties. This approach is not contemplated by
22 the administrative process as outlined in the rules.

23 The Executive Secretary wants to protect the
24 Division of Air Quality's ability to perform its
25 regulatory mandate without a non-party's interference.

1 The Divi -- the Division of Air Quality meets routinely
2 with sources who have filed appeals to a notice of
3 violation or request for agency action to resolve those
4 permit and compliance issues after the Executive
5 Secretary has issued a final order.

6 If the Court of Appeals determines that the
7 Sierra Club is a party, it is true that these
8 proceedings would begin again. However, if -- the
9 Executive Secretary submits that it would be against the
10 public interest to force the parties who are actually
11 parties in these proceedings to sit on their hands for
12 12 to 18 months, or possibly longer, until the Court of
13 Appeals rules on the standing determinations.

14 And just to wrap up -- I don't want to take
15 too much time, because the other parties have done a
16 very good job of covering the, the elements of the rule.
17 Whether this request for agency action issue presents
18 issues of public importance, that is a straight out of
19 the standing test.

20 Just two months ago, this Board determined
21 that the issues that Sierra Club was presenting did not
22 rise to the level of significant public issues. It
23 would seem very strange now for -- to apply the same
24 test for a motion to stay, and argue that all of a
25 sudden the issues have become serious enough in the last

1 two months to warrant the issuance of a stay. Thank
2 you.

3 THE CHAIR: I'd like you -- if you would
4 like to make a rebuttal. And then we'll open it to
5 questions from members of the Board to any of the
6 parties.

7 MS. WALKER: Thank you. Initially I'd like
8 to correct a suggestion that the standard of review that
9 the appellate court would apply would be arbitrary and
10 capricious. Actually, the standard of review and what
11 that means is how much deference the Court of Appeals
12 would give this Board.

13 Because standing is a question of law, and
14 particularly in this case, where the Board did not
15 question the facts that the Sierra Club and the Grand
16 Canyon Trust put forward. Those facts were taken as
17 given, and merely applied to the law, or the law was
18 applied to those facts. In that case the standard
19 review gives no deference to this Board.

20 Therefore, the standard that we have to meet
21 in order to overcome this Board's decision is
22 essentially we just have to show what the law would say.
23 No deference is given to your decision. So to the
24 extent that -- the suggestion is is that we have this
25 giant hurdle to overcome.

1 That's not valid. We're essentially
2 starting over, with the Court of Appeals. On the basis,
3 certainly, of what was in the record, but we don't have
4 to sort of overcome your decision.

5 It's true that the stay is discretionary.
6 And, as you also know, there's a provision that we
7 quoted in our brief that gives you discretion to provide
8 a remedy during the pendency of -- well, I'll just read
9 it.

10 It says: Unless precluded by other statute,
11 the agency may grant a stay of its order or other
12 temporary remedy during the pendency of its judicial
13 review according to the agency's rule. So essentially
14 it's wide open for you to make the determination that
15 you feel is best in this case.

16 On this issue of harm, the -- first of all,
17 the focus of the harm in the standing case is harm by
18 the project. So completion of the project approved by
19 the permit, essentially. The issue of harm here today
20 under the four-part test is the harm that the Sierra
21 Club would suffer if the proceeding goes forward. So
22 the harm is essentially what would happen to us if
23 discovery occurs, scheduling occurs, that sort of thing.

24 And on the flip side of that is that
25 currently there is no stay of the construction of the

1 facilities that have been approved by the permits. So
2 all this suggestion that the parties are gonna -- or
3 that the applicants are gonna be harmed by some delay in
4 their ability to build things or to acquire coal is
5 irrelevant, because there's no stay.

6 We're asking for a stay of the proceeding.
7 Currently there is no stay of the construction of the
8 facilities. Now, it doesn't say we won't ask for one
9 somewhere down the line, but we haven't asked for one
10 yet. Because, as far as we know, there's no proposals
11 right now to actually go ahead and do that.

12 There's also been this issue of bonds. Now,
13 first of all, the issue of bonds is not in your
14 four-part test. And secondly, typically when
15 environmental groups and public interest groups seek
16 stays, typically they are not required to post bond.
17 Or, if so, it's very minimal. You know, that's a whole
18 'nother issue that essentially would have to be decided
19 by the Court of Appeals.

20 But there's no guarantee that we're -- that
21 the Sierra Club is gonna be forced -- if they get a stay
22 from, for example, the Court of Appeals, there's no
23 suggestion that, that we would be forced to post some
24 giant bond. Typically, public interest groups don't
25 post bonds. Or, if they do, they're very small.

1 Okay, the -- then there was the suggestion
2 that what the EPA says doesn't matter. It's true that
3 the EPA is the interpreter of the Clean Air Act. And
4 it's true that this whole proceeding is essentially the
5 State of Utah's implementation of the Clean Air Act.
6 Therefore, what the EPA says does matter. Particularly
7 because the EPA holds authority over Utah's ability to
8 implement the Clean Air Act.

9 And there was this suggestion that, because
10 Sierra Club has submitted comments along -- during the
11 comment period provided by the Division of Air
12 Quality -- which, of course, we appreciate those
13 opportunities -- that somehow all our needs have been
14 met.

15 Well, the whole point of having a proceeding
16 and judicial -- ultimately possibly judicial review of
17 the decision of the Division of Air Quality is because
18 the idea is that you want independent review. And
19 that's what this Board is supposed to do; independently
20 review the decisions of the Air Quality Board.

21 Up until now, the Air Quality Board has made
22 all the decisions. Albeit based on public input, but
23 there's been no independent review of that decision.
24 This proceeding is supposed to allow independent review.
25 It's not at all the same as making comments it -- the --

1 in the public comment period. It's just not the same
2 thing.

3 And the suggestion that settlement could
4 occur merely underscores the harm that Sierra Club would
5 suffer if settlement were allowed to be negotiated while
6 it was seeking judicial review of this Board's decision.
7 I mean, essentially a settlement goes a long way towards
8 resolving the issue completely.

9 If we're entitled to full-party status, we
10 would have to be a part of those settlement
11 negotiations. So the sug -- the suggestion that, that
12 somehow the Board shou -- I mean the DAQ shouldn't be
13 hampered in its ability to conduct settlements merely
14 underscores the fact that Sierra Club should be involved
15 in anything that occurs, or would be if it was granted
16 full-party status.

17 And that these sort of decisions, that have
18 a lot of impact on this proceeding, shouldn't be allowed
19 to made -- be made until the Court of Appeals addresses
20 our -- the standing issue. And there was a suggestion
21 that the Sierra Club is turning these arguments on --
22 well, that, that the Sierra Club is somehow saying --
23 trying to remove jurisdiction of this matter from this
24 Board and placing it in the Court of Appeals.

25 But by the same token, when the applicants

1 suggest that you shouldn't grant a stay because the
2 Court of Appeals should do that, they're doing the same
3 thing. I mean, this question is squarely before you.
4 It's an issue that matters to your proceeding. This is
5 your proceeding, and therefore you should make a
6 decision.

7 And I think that, given particularly that
8 there is no stay on construction, so that the parties --
9 the applicants presumably can start building tomorrow if
10 they want to. That there is no real harm except for to
11 the Sierra Club, because they're being excluded from a
12 proceeding.

13 The longer it goes on, the more prejudice
14 the Sierra Club will incur. That really wouldn't harm
15 anyone if it were delayed, particularly given because no
16 one is being prevented from constructing their
17 facilities in the meantime.

18 And I think the final issue is is that
19 standing is confusing. And the courts are better
20 positioned to address it. They wrote the opinions that
21 you are trying to apply to our facts. And, because
22 there may be questions still in your own mind -- maybe
23 not -- but certainly you realize that this is an issue
24 new to you, that's accustomed to the courts.

25 Let them decide it, before the Sierra Club

1 is prejudiced in this matter. Thank you very much.

2 THE CHAIR: All right. Do Board members
3 have questions for any of the parties? Okay, we have
4 Marcelle, and then Jerry, and then Steed.

5 MS. SHOOP: Mr. Chairman, I'm not sure who
6 to address this question to, but I just wanted to get
7 some clarification with respect to the IPP matter. In
8 terms of the status of the permit and, and the appeal,
9 as I understand it, the only stay that's being requested
10 is the stay relative to IPP's appeal on a -- Condition
11 24; is that correct?

12 MR. NELSON: That is correct.

13 MS. SHOOP: And so if -- the permit has not
14 yet been issued?

15 MR. NELSON: No. The permit has been
16 issued. I -- that's, that's a point that I think needs
17 clarification. The permit has been issued, in both
18 circumstances, by the Executive Secretary. And
19 Ms. Walker is correct in that both companies could start
20 to construct tomorrow under that permit. There is no
21 stay of that construction.

22 Now, as a practical matter there may be a
23 stay because of financing, or company decisions that
24 they want a final permit before they begin. But from a
25 legal standpoint, there is no stay on the construction.

1 What this Board is being asked to decide in those permit
2 appeals is the validity of the provisions of the permit.

3 And for the IPP matter, the only matter left
4 pending before the Board is the IPP challenge to a
5 provision in the permit. But if IPP wanted to construct
6 on the basis of the permit as it's been issued, it
7 could.

8 MR. GROVER: But then what would be the
9 result if they are ultimately not successful in the
10 appeal? I mean, the approval order would then be
11 modified. So they would have started construction on a
12 permit that --

13 MR. NELSON: And, and that's part of the
14 decis --

15 MR. GROVER: -- is in flux.

16 MR. NELSON: That's part of the
17 decision-making process that IPP has to deal with.

18 THE CHAIR: And the Condition 24
19 specifically addresses emissions during start startup
20 and shutdown and upset, which really could -- it could
21 potentially affect hardware, but not necessarily. But
22 that, that is the issue. Do you have another question?

23 MR. GROVER: I did. I just had a question
24 for the Sierra Club. Just, since we aren't part of all
25 the briefings in the circuit court appeal -- thank

1 goodness.

2 MR. NELSON: Well, at this point the only
3 briefing is a two-page --

4 MR. GROVER: Okay.

5 MR. NELSON: -- document that says "we
6 appeal."

7 MR. GROVER: Okay, well that was my
8 question. Is have you asked the Circuit Court of
9 Appeals for stay of these proceedings pending a termi --
10 determination of your standing issue?

11 MS. WALKER: The -- we have to ask you
12 first. That's the way the --

13 MR. GROVER: So it's not --

14 MS. WALKER: -- process is laid out. So we
15 ask you first. Which is why, if you remember, we were
16 in such a hurry, because --

17 MR. GROVER: So they wouldn't determine it's
18 not right until we've determined -- made our
19 determination is what you are saying?

20 MS. WALKER: Basically. I mean, the way it
21 goes is we ask you first. Either you -- and then based
22 on your decision here, we go to them. If you grant us a
23 stay, then we just go straight to the merits. If you
24 don't, then we ask them for a stay.

25 MR. GROVER: Okay. I just wanted to know

1 what the request of the court currently was.

2 MS. WALKER: Right. So, so we haven't asked
3 yet, no. We're waiting for your decision.

4 MR. BURWELL: So being new to the Board,
5 have you presented a case as to why you want the stay?
6 Is it around the nature of what these power plants
7 are -- you know, the type of power plants that they are
8 and the impact on the air quality? Is that -- has that
9 been articulated --

10 MS. WALKER: Yeah. I think --

11 MR. BURWELL: -- to the Board members?

12 MS. WALKER: I, I think what you are asking
13 is if we've provided the basis for essentially what --
14 an appeal of the, of the Department of Air Quality
15 decision on the permits. And yes, we have. That's in
16 our request for agency action.

17 And we laid out, I'm forgetting, but I think
18 19 very specific points with regard to the IPP plant,
19 and I believe 9 or so with regard to the SPC plant. And
20 they deal with emissions, visibility, impacts on
21 national parks, things like that. And I would hope that
22 you have been provided with those pleadings.

23 MR. NELSON: Because he is a new Board
24 member, I don't know whether you've been sent previous
25 packets. But that doesn't matter. I --

1 MS. WALKER: Uh-huh.

2 MR. NELSON: I think you just got the motion
3 for stay.

4 MR. BURWELL: I believe so, yeah.

5 MS. WALKER: Okay. But maybe -- I -- it
6 will probably be too late to -- once you get them the
7 Board will have made a decision already. But
8 essentially, you know, they're based on the, the issues
9 we raised.

10 MR. BURWELL: Your assessment of the
11 emissions for the two plants?

12 MS. WALKER: Yeah, and the permitting of
13 those emissions, essentially. They focus on, on those
14 And whether they comply with state and federal law.

15 MR. BURWELL: And you mentioned the Grand
16 Canyon Trust. You represent both; two different,
17 disparate, distinct entities?

18 MS. WALKER: That's right.

19 THE CHAIR: Mr. Horrocks?

20 MR. HORROCKS: Ms. Walker, in your initial
21 presentation you made a statement that if this Board
22 denies the motion for stay, that we would essentially be
23 denying the Sierra Club access to the courts. I was...

24 Did I miss hear you? Did -- or could you
25 elaborate?

1 MS. WALKER: No. Well, I, I don't know if
2 you misheard me or not. But certainly if that's what I
3 said, it's very confusing. What I meant is, you know, I
4 brought up this whole issue of, of the EPA and whatnot
5 to suggest that this is a complicated situation that
6 should be handled by the courts. And that this raises a
7 lot of questions. Let the courts deal with it.

8 Issue a stay in the meantime because, from
9 our perspective, fairness requires it. But what I
10 wanted to say is that, when I was quoting the EPA saying
11 the Clean Air Act requires judicial review of PSD
12 permits, that in our situation here in Utah, essentially
13 whatever standard that is applies to this Board as well.

14 And the two reasons are is that the standing
15 requirement is the same for the Board as it is for the
16 courts because the Board is trying to apply the, the
17 court standard to this proceeding. And the second is is
18 because to, to -- under our Administrative Procedures
19 Act no entity can go straight to the courts without
20 going through this Board, because they are required to
21 exhaust their administrative remedies.

22 So essentially the point I was trying to
23 make is, is that what the EPA says about standing is
24 re -- and standing relative to the courts, is relative
25 to the -- it matters to this Board as well. And the

1 point being that it just shows that there's a lot of
2 confusing issues to be dealt with.

3 And that this really matters, because it
4 reflects not just on these two permits, but on the
5 entire way that Utah goes about implementing the Clean
6 Air Act. So it's a big issue. And that suggests that
7 that fourth factor has been met. Does that help? Okay.
8 Sorry, it's kind of confusing.

9 THE CHAIR: Other questions/comments by
10 members of the Board?

11 MS. SEGHINI: Yes, I have a question. In
12 terms of the court action...

13 THE COURT REPORTER: I'm sorry ma'am, can
14 you speak up?

15 MS. SEGHINI: Yes. In terms of the court
16 action, is this an action being brought by the Sierra
17 Club to determine standing? Is, is that what the
18 appellate court action is?

19 MS. WALKER: That's right. So we've, we've
20 already filed essentially a petition for review of your
21 decision denying us standing. And we've done that
22 already.

23 MS. SEGHINI: So you would have full ability
24 to interact in terms of that court process because you
25 filed a case, would you not?

1 MS. WALKER: Yeah. But what we're --

2 MS. SEGHINI: To defend your position that
3 you do have standing?

4 MS. WALKER: Yes. But what we're asking the
5 Board to do in the meantime while we're working that
6 out -- and I'm certainly not complaining about our
7 access to the Court of Appeals. We're fine with that.
8 But what we're saying is in the meantime would you hold
9 up, delay these proceedings.

10 So that if it turns out that we're right and
11 we have standing, that we're not prejudiced by the fact
12 that the proceedings have gone forward without us. So
13 certainly we're plenty happy with our ability to seek
14 review of your decision.

15 MS. SEGHINI: Thank you.

16 THE CHAIR: Any other questions? Probably
17 for the benefit, since we've had a -- oh, yes. We'll
18 give Mr. Finlinson, yes.

19 MR. FINLINSON: Mr. Finlinson. I'd just
20 like to offer a rebuttal piece of information. The
21 question is could the plant go forward because we do
22 have a permit that authorizes us to construct. It was
23 granted by the Executive Secretary. But in today's
24 market you wouldn't get past first base, in terms of
25 anybody who had to put up the financing for that project

1 of saying, "Do you have a valid permit?"

2 We'd say, "Yes, we have a valid permit. But
3 it's subject to the review process that we're presently
4 going through." And that process of being able to say,
5 "Yes, we have a valid permit," will probably take longer
6 if it goes through the, the question in the Circuit
7 Court of Appeals on standing.

8 But even though we have a permit, I can
9 assure you that we don't have 500 million -- speaking of
10 the current company -- to go do that. My guess is the
11 Intermountain Power Project doesn't have the additional
12 money that they have -- would be required to come up
13 with, until that permit issue is resolved through the
14 review process. Both the administrative and the
15 judicial process.

16 So you are not going to see construction
17 until their permit that is gone through the process of a
18 review.

19 MR. HALEY: Just for the record --

20 THE CHAIR: Yeah, let's Mr. Haley and
21 then...

22 MR. HALEY: Just for the record, IPA/IPP
23 joins in the comments of Mr. Finlinson. That would go
24 for us as well.

25 MS. SHOOP: I just had a quick question of

1 Mr. Finlinson. As I understand, what you just said is
2 that regardless of, of -- however long it takes for this
3 matter to work its way through the Utah court systems is
4 however long it's gonna be before the power plant is
5 constructed?

6 MR. FINLINSON: Exactly. On, on either
7 power plant.

8 MS. SHOOP: So is there really harm to the,
9 the power companies if this proceeding is stayed if, if
10 what is really the, the thing that's gonna hold you back
11 is the, is the Court of Appeals process?

12 MR. FINLINSON: Well, yes. But in the Court
13 of Appeals there's the protection of whatever that bond
14 will be. And she suggested that it would be minimal or
15 small. And, of course, we're gonna urge the court to,
16 to get it to reflect the true amount of the damage.

17 And there is a process in the appellate
18 procedure for the presentation of the different opinions
19 of what that bond ought to be while -- if, if they
20 considered granting the stay. Now, the test at a -- the
21 Court of Appeals are basically the same tests that you
22 have. It's still a four-part process. And, and it will
23 be contested there as well.

24 But the net result is if, if that stay is
25 put in place, where if you grant it, that stops us from

1 proceeding down the road to reviewing the rest of the
2 issues that have been raised on whether or not the
3 permit that was granted by the Executive Secretary is
4 correct, and is a valid permit.

5 That extra delay, we think, is detrimental
6 to the, to the power companies. Both power companies.
7 Both of you submitted -- both of us have indicated that
8 to you today. The difference is if you grant a stay, we
9 don't have the protection of whatever the bond is going
10 to be in the event that they fail.

11 We submit that there's a pretty good
12 likelihood that they'll probably fail. But in the
13 appellate court, they have to deal with that issue. A
14 whatever protection is afforded by the, the bond is
15 simply not available at this level.

16 MR. HALEY: May I address your question from
17 my perspective?

18 There would be an additional practical
19 problem that we would have, in terms of trying to reach
20 a resolution on the, the SS --
21 startup/shutdown/maintenance issue. If there was a stay
22 issued, that would stop basically everything.

23 Right now, while the appeal of the standing
24 issue is going forward, we could continue to try to
25 resolve the remaining issues on, on the, the

1 startup/shutdown and maintenance point. Where a stay --
2 if the stay was issued, it would stop everything. We'd
3 have to wait for the appeal to come, and then come back
4 to where we are right now.

5 So it would be inefficient from that
6 perspective. And then there's also the bonding issues
7 that -- we think if they're -- if they want to proceed
8 with the appeal, then we will argue in the Court of
9 Appeals that they should -- the Sierr -- "they" being
10 the Sierra Club, should have to post a bond for the
11 damages that we would incur as a result of a delay on
12 going out to the capital markets, or to a lock in our
13 long-term coal contracts.

14 MS. SEGHINI: I have another question.

15 THE CHAIR: Yes.

16 MS. SEGHINI: My question is this. The
17 previous decision of the Board was -- indicated that the
18 Sierra Club had no standing. And that is what they're
19 appealing. Would it make a difference in their ability
20 to participate in discussions if we, as a board, give
21 them amicus standing -- if I'm saying that correctly --
22 so that they, then, would be part of the discussion,
23 even though they wouldn't have legal standing?

24 MR. NELSON: Let me comment. They were
25 granted amicus standing in the Sevier Power Company

1 proceeding. There was no grant of amicus in the IPP
2 proceeding.

3 The, the difference between amicus and party
4 status, as best I can describe it, is that when you are
5 a party you have a right to fully participate in the
6 proceedings. Which means that you can present
7 testimony, present witnesses, file motions, cross
8 examine. And participate as if you were one of the, the
9 parties like the Executive Secretary and the company.

10 An amicus status gives an ability to present
11 a brief or make oral comments on what has been
12 presented. And so you can file briefs on issues. You
13 can file information with respect to what the record is.
14 But it does not require any kind of a legal standard to
15 be granted participation. Amicus is just at the
16 discretion of the Board.

17 The party status, however, you have to
18 demonstrate, as we went through the process, of
19 standing, and the ability to participate and demonstrate
20 the intervention requirements.

21 MS. SEGhini: I have one other question, and
22 I apologize because I missed the last meeting. As we've
23 gone through the permitting process, have we not
24 carefully examined the emissions standards and the
25 expected emissions from these two plants, and whatever

1 are the inventories that exist in that area?

2 MR. NELSON: The, the Executive Secretary
3 went through that process as part of the permitting
4 process. The status we are at at this part of the
5 proceedings, though, is that they have presented
6 challenges to those decisions. And that's what this
7 Board is adjudicating.

8 MS. SEGHINI: "They" being?

9 MR. NELSON: The Sierra Club.

10 MS. SEGHINI: The Sierra Club?

11 MR. NELSON: And the Citiz --Sevier
12 Citizens' Group.

13 MS. SEGHINI: Thank you.

14 THE CHAIR: Couple comments. It's a little
15 awkward here, because we've had several board members
16 who weren't here two months ago when we made the
17 decision. Power plants, of course, have been around for
18 a long time. But not many power plants have been built
19 in the last 20 years.

20 So a lot of the issues that are being
21 brought up are in the interpretation of what does best
22 available coal technology mean in a plant built in 2005.
23 And those are issues subject to interpretation. And
24 that is what has been raised. But by majority vote of
25 the Board, we denied Sierra Club standing in those

1 issues two months ago.

2 First, I am a little uncomfortable with
3 that. But, you know, we do vote by a majority vote.
4 And it was a -- in the statement that I signed on behalf
5 of the Board, we found that this power plant
6 construction is not a major public issue.

7 For someone who's been involved in Western
8 Regional Air Partnership, we go through all these
9 meetings, we talk about dust, and we talk about
10 vehicles, but we always get back to stationary sources.
11 They're the big one that affect air quality in the West.

12 And the WRAP has certainly devoted a
13 substantial amount of its resources to the best
14 available retrofit technology for the plants that
15 predated BART. The upgrading of power plants, such as
16 the initiative that PacifiCorp has taken on their own to
17 reduce emissions from the plants.

18 So I think they are major public issues, as
19 proven by how much time we spend talking about it in
20 forums like the WRAP. And it's also been said, "Well,
21 the citizens have had their chance, during the public
22 comment period, to provide their input." And that --
23 but that's the, the advocates talking to the agency
24 staff.

25 As a board, we are the ones who are supposed

1 to review whether the staff correctly interpreted -- or
2 correctly applied what was presented in the hearings.
3 Again, by a majority vote, we chose not to do that. I'm
4 personally gonna welcome -- would welcome the guidance
5 of a court on these complicated questions of standing.

6 And I think that's what's before us. So
7 there -- that's my input. Is there other discussion
8 from members of the Board before we ask for a motion?

9 MR. BURWELL: Well, I -- can I make a
10 comment? As a new member it, it seems as if, you know,
11 I've joined the Economic Development Board as opposed to
12 an Air Quality Board. And it seems like our
13 responsibility is around air quality, not the arguments
14 put forth around the economic impact on a couple power
15 plants.

16 And from that standpoint, you know, the fact
17 that an organization has raised questions around the air
18 quality impact of two projects, and as a board we did
19 not give them standing, you know, raises questions
20 around what our motivation, our goals, and objectives
21 are.

22 Again, if, if the arguments by another
23 organization are these impact the air quality, and the
24 arguments by the other projects are around the economic
25 impacts of the project, you know, what, you know, I

1 think -- isn't it our responsibility to enforce the air
2 quality of the state for the citizens? And make sure
3 that we're doing the right thing in that regard?

4 MR. GROVER: Well, I think the law requires
5 us to look at harm. It didn't say any air quality harm.
6 We don't really operate in a vacuum is what I'm saying.
7 Yeah, we deal with air quality issues. But when the law
8 says we have to follow and look at certain things, one
9 of which is harm, then we have to look at it.

10 So, I mean, I understand what you are
11 saying. And it seems like we're getting off into areas
12 that we don't know, that we think we're experts at,
13 perhaps, because we're here because of our air quality
14 knowledge. But, you know, having sat through the
15 hearings and everything, we were required -- the law
16 specified exactly what we were supposed to determine for
17 standing.

18 And it was harm. We had to determine
19 whether there was harm or not harm to those that were
20 actually petitioning. So -- it would have been nice if
21 we didn't have to, but that's what the law required us
22 to do. So, I mean, I'm just kind of defending the
23 position. And there was a lot of discussion about that
24 during the meeting. So it wasn't --

25 MR. BURWELL: Harm, harm to the parties, o

1 harm to the air?

2 MR. GROVER: Well --

3 MR. SAMUELSON: Harm to the parties.

4 MR. BURWELL: Okay.

5 MR. GROVER: But the Sierra Club made
6 arguments that actually talked about environmental harm
7 as well --

8 MR. BURWELL: Okay.

9 MR. GROVER: -- the public advocacy
10 position. So there was all of that. There was all --
11 elements of that. But I think specifically we looked to
12 what the -- the law required us to make a finding as to
13 whether there was harm or not, so.

14 And I think that's one of the standards here
15 again, is another irreparable harm. We have to look at
16 that. That could be -- it doesn't say just air quality.
17 You have to say, you know. If us, by staying an air
18 quality decision, we'd have to look at the harm that
19 would result from that from an economic standpoint as
20 well.

21 So I don't think it limits us just to
22 environmental harm. Maybe Fred can correct me if I'm
23 wrong, but.

24 MR. NELSON: The -- you are looking at, with
25 respect to a stay, at the harm, again, to the parties,

1 and the relative positions of the parties, when you are
2 talking about staying a proceeding. The, the courts
3 and --

4 The reason that this standard is set with
5 the requirements that are listed there, and it marries
6 up as was indicated with what the judicial process would
7 be in granting a stay, is that there is a -- there is
8 usually a deference on the part of the court to maintain
9 the status quo.

10 Whatever decisions have been made should
11 stay in place, unless you can demonstrate those four
12 criteria. And if those four criteria then meet certain
13 requirements, then the Board or the court will step in
14 and say, "We're going to go outside the status quo for
15 the moment and put a stay in place." Depending upon
16 those criteria, and those criteria being met.

17 MS. BUNKER: In regard to Mr. Grover's
18 comments, I am assuming that when this was discussed
19 before, all of these things were discussed. It, you
20 know, pro and con and everything, when the -- when you
21 had the, you know. This wasn't held in a vacuum; is
22 that right?

23 MR. GROVER: Well, there was, I don't know,
24 at least two or three inches of briefs on --

25 MS. BUNKER: That's what, that's what,

1 that's what I'm saying, you know. So all of these
2 different aspects were discussed?

3 MR. GROVER: Well, I don't know how in
4 depth. I mean, you know, you have to review the
5 minutes. I'm not trying to represent something that
6 maybe isn't in the minutes. I'm just saying there was
7 discussion. There -- we did go through all those legal
8 points. We did talk about -- each party had a chance to
9 make their case --

10 MS. BUNKER: So all of this was -- all of it
11 was discussed?

12 MR. GROVER: Yeah. I --

13 MS. BUNKER: Okay.

14 MR. NELSON: You had a copy, in your packet,
15 of the orders --

16 MS. BUNKER: Right, right.

17 MR. NELSON: -- of the Board --

18 MS. BUNKER: Right.

19 MR. NELSON: -- and the discussion, and the
20 rationale.

21 MR. GROVER: And one of the things is we
22 didn't have this unanimous voice, either. Which the
23 Chair has indicated. Which probably precipitated a lot
24 more discussion than being fairly unanimous. So I do
25 think it was -- a lot of areas were explored, and a lot

1 of questions were asked.

2 MR. NELSON: There was a split --

3 MS. BUNKER: However --

4 MR. NELSON: There was a split vote on every
5 motion.

6 MS. BUNKER: But whatever, the majority
7 ruled on that though, you know. That wasn't -- that was
8 the voice of the Board. After, you know. Whether it
9 was 5-4 or, you know, 6-1, whatever. That is -- that
10 was the voice of the Board.

11 MR. NELSON: Right.

12 MS. BUNKER: Right? Okay.

13 THE CHAIR: So.

14 MS. SEGHINI: Just in, in terms of the
15 discussion. Is our job to protect industry, or is our
16 job to protect the environment? And our job always is
17 to protect the environment. That's why we regulate
18 industry. And that's why we look at the regulations.
19 That's why we have very rigid requirements before
20 permits are, are issued.

21 Certainly the, the stationary sources are
22 going to emit a certain amount of pollution. But in our
23 society if we can control that so that it meets the
24 requirements for a healthy environment, then we can
25 function better as a society. I hate to think what it

1 would be like to be without electricity.

2 MR. GROVER: I think, I think we're kind of
3 presupposing, though, that that's what the -- that's
4 what the rules and all the determinations that are made
5 by the Executive Secretary takes that into
6 consideration. I mean, I -- I'm just saying I, I don't
7 know that -- we weren't really reviewing the big global
8 environmental, you know, regulatory scheme when we were
9 reviewing it.

10 We were just reviewing the specifics of this
11 particular request involving this permit which the
12 Executive Secretary had granted, and said it had been
13 reviewed, and that the laws had been followed. And I
14 think, you know, Mr. Veranth raised an issue. Maybe
15 there's some interpretation he didn't agree with.

16 But that wasn't the determination of the
17 Executive Secretary. And the petition was to say -- you
18 know, to take that basically from the Executive
19 Secretary to review -- the Air Quality Board to review
20 that. Which they did. And one...

21 THE COURT REPORTER: I'm sorry?

22 MR. GROVER: Speak up? Okay. For one of
23 the applicants. But for the other we just didn't find
24 they had the standing to raise the issues, because they
25 didn't meet the specific criteria that the law required

1 us to review, so.

2 MS. SEGHINI: Okay.

3 MS. SHOOP: I have a question. It's
4 probably for the attorneys. But I guess my question is
5 how would it affect the appellate process if the Board
6 were to permit a stay of the proceedings only for a
7 limited period of time while the parties asked the court
8 to determine whether or not a stay -- a full stay was
9 appropriate? I don't even know if that's possible,
10 procedurally possible.

11 THE CHAIR: I guess...

12 MR. NELSON: You want me to comment? I
13 think that the Board can do whatever it wants to on the
14 particular kind of matter. If that's what the Board
15 decides it would like to do, it has the authority to do
16 that.

17 MR. SAMUELSON: Mr. Chairman? You know, I,
18 I am struck by Mayor Seghini's comment, you know, that
19 it is our duty to protect the environment. And I fully
20 endorse that. And she also mentioned, you know, can we
21 envision ourselves living in a community or a world
22 without electricity. And I think most of us cannot.

23 The rules and regulations, the standards
24 that we have, don't represent what's healthy and what's
25 not healthy. None of this is healthy. Okay? What it

1 represents is the best possible compromise of our -- the
2 existing technology and what lungs can tolerate.

3 And so while we, we have to balance that, I
4 think it's, it's much more a question of degree rather
5 than black and white. We have to balance the need for
6 power. And I think we would all have to admit that we
7 have a need for power. We also have to balance that
8 against the fact that, that any amount of these
9 pollutants is unhealthy.

10 It's a question of degree. We can probably
11 exist longer with less. But can we exist at all without
12 electricity? So, you know, I -- as I'm listening to
13 both arguments I'm struck by, you know, the tendency to
14 declare one side wrong and one side right. And
15 obviously it's never that simple.

16 For me the question seems to be, who is
17 harmed most? And does our granting a stay really result
18 in tens of millions of dollars to the power companies?
19 In which case, that's considerable harm. Does our
20 denial of a stay prevent the Sierra Club from pursuing,
21 you know, their mission of protecting the environment.
22 These are not clear-cut questions.

23 It sounds to me that no matter what we do,
24 this ends up in court; is that correct?

25 THE CHAIR: Probably.

1 MR. SAMUELSON: Okay. Is, is there any
2 action of the Board that prevents this from ending up in
3 the court.

4 MR. NELSON: Well, it really is already in
5 court on the, on the motion to intervene. Let, let me
6 describe what I think the two choices are. The choice
7 of denying the stay means that this Board would go
8 forward with the proceedings.

9 That means that you would hear the IPP
10 appeal of its own permit on that particular provision.
11 You would also hear the Sevier Power Company appeal by
12 the Sevier Citizens' Group. You would go forward with
13 that proceeding.

14 If, at some point in time, the Sierra Club
15 prevails in the Court of Appeals, they would then come
16 back to the Board and would be a party to the
17 proceeding. And at that point they would raise the
18 issues that they have raised in their petition to
19 intervene.

20 Depending upon where those two processes are
21 at the point -- at that point, they would -- there may
22 have been some decisions that the Board would need to
23 re-look at because they had not had a, an available
24 process to present their own witnesses or present their
25 own testimony. But they would not be denied an

1 opportunity to present evidence and information to the
2 Board, because they would then be a party.

3 You may have some kind of a precedent value,
4 because you've decided some issues with respect to
5 concurrent proceedings, that you would say, "Well, wait
6 a minute. We decided this. Now, in looking at this
7 information that the Sierra Club is presenting, do we
8 want to decide it differently?" Which is what happens
9 in courts every day. You have different parties arguing
10 different issues, and they then have precedence and
11 decisions.

12 So that would be the one process that the
13 Board would, by denying the stay, that would be the
14 process. If you grant the stay, what that would mean is
15 that the administrative proceedings would wait until the
16 decision is made by the appellate court. And, depending
17 upon how that decision went, the Sierra Club would be a
18 party to the proceedings or not a party to the
19 proceedings, and then the Board would go forward.

20 So that's the really the two options that
21 the Board has. Now, if there's any disagreement with my
22 description...

23 Uh-oh, there was.

24 THE CHAIR: Okay, I think we're gonna let
25 you.

1 MR. HALEY: George Haley on behalf of IPA
2 The only thing I just want to do is respond, first of
3 all, to what Ms. Shoop was saying about -- in terms of
4 modifying some kind of order pending the, the Court of
5 Appeals' determination of stay.

6 As a practical matter, it wouldn't be
7 necessary. They have to act, like right now. They've
8 already filed their appeal. So in order to have a stay
9 issued it would -- they would have to do it within the
10 next 30 days anyway. Nothing is gonna happen during
11 that time frame. So as a practical matter, that remedy
12 would already be there.

13 And then the only other thing in terms of
14 what Mr. -- what Fred was saying is that I just want to
15 draw the attention back to the four-part test. In order
16 to issue the stay it's not just weighing those two
17 issues, what you prefer. But you have to, you have to
18 decide that the Sierra Club has met all four of those
19 elements of the four-part test. Including the, the
20 damage issue. The irreparable harm issue. Which is
21 really the --

22 MR. NELSON: I, I appreciate that
23 clarification. My comments went simply just to the
24 process. Not the standard in making the decision.

25 THE CHAIR: Mr. Finlinson?

1 THE WITNESS: I just want to submit to you
2 an interesting observation. We have filed a brief that
3 thick (indicating), I think as Mr. Grover indicated.
4 And we haven't yet, with everything that's been
5 submitted, start to get at whether or not the decision
6 of the Executive Secretary was environmentally correct
7 and consistent within the Clean Air Act.

8 We have been involved in a procedural issue
9 of who can come and have a seat at the table. And we
10 have not yet, and, and until you start into the
11 administrative review of the actual permit, all of this
12 skirmishing that's going on is delaying the review to
13 see whether or not the decision of the Executive
14 Secretary was, in fact, consistent with the requirements
15 of the Clean Air Act to provide the right kind of
16 balance that we've been talking about that you need to
17 have, and see whether or not the application meets the
18 requirements for permitting a coal-fired plant.

19 So until we can get into the administrative
20 process, you are not really dealing with the issue of
21 what's in the permit. And whether the permit was the
22 appropriate thing to do. You are not protecting the
23 environment. We're skirmishing. And we're submitting
24 that granting a stay by this Board delays the
25 administrative review of whether or not the decision is

1 actually right.

2 THE CHAIR: Mr. Stephens and Ms. Walker?

3 MR. STEPHENS: Chris Stephens, Attorney
4 General's office. To use a very pedestrian analogy,
5 granting a stay is like hitting pause on a remote
6 control. Everything just kind of freezes where it is.
7 Now, depending on the side you are on, that either works
8 for you or it works against you. No matter what
9 decision the Board makes today, it's gonna have an
10 impact.

11 I just thought I'd point out though that,
12 like Mr. Finlinson was saying, we're dealing with the
13 legal aspects of whether the Sierra Club has
14 demonstrated that it has met the threshold requirements
15 for participating in these proceedings. Two months ago
16 the Board decided that it did not.

17 The standards for issuing a stay are not
18 overly different from the standards for establishing
19 standing. So I just want to encourage you as you, as
20 you weigh this decision, to reflect on the decision that
21 was made over standing. Where does the balance lie with
22 the harms -- the relative harms here?

23 If you ask Sierra Club, they're going to say
24 that not having a stay is harmful to them. If you ask
25 the, the Sevier Power and Intermountain Power, they're

1 gonna say that a stay harms them. From the perspective
2 of the Executive Secretary, it is not a wise use of
3 government resources to be hitting -- have your finger
4 stuck on the pause button for a year to a year
5 and-a-half.

6 THE CHAIR: Ms. Walker?

7 MS. WALKER: When, when Fred was describing
8 the two choices before the Board, I would agree with his
9 characterization of it. Except for, because I'm coming
10 at it from the point of the Sierra Club, I would suggest
11 that a process going on without a party is much more
12 prej -- prejudicial than he suggested. Because all
13 sorts of decisions are made along the way. And the
14 members of the Board start to form opinions and make
15 decisions.

16 And if they're not presented with all the
17 sides, including the side of the Sierra Club, then those
18 decisions that start to become ingrained aren't made
19 with the benefit of what the Sierra Club can do or can
20 present to the Board.

21 So in other words, to make well-rounded
22 decisions that are based on all the facts that
23 potentially the parties would want to bring to the Board
24 requires holding off on the process until all the
25 parties are or are not at the table, as the case may be.

1 So, so in other words, what I'm saying is
2 that to allow the process to go forward really does
3 impact our ability to influence you. That's what we
4 want to do. We want to have the chance to influence
5 you. And in order to do that, we need to be
6 participating as a full party.

7 And all we're asking is that you wait until
8 a decision on whether we're entitled to that is made by
9 the courts, so that you don't start to make decisions
10 and form opinions that we can't influence. Thank you.

11 THE CHAIR: Mr. Horrocks?

12 MR. HORROCKS: I, I agree with your start --
13 statement earlier, John, that this is somewhat awkward
14 today because of, of the new board members, and those
15 people that weren't present at the, at the main meeting.
16 Our focus in the main meeting was, was fairly narrow.
17 And that was to determine whether or not certain
18 entities had standing.

19 I believe the Board weighed that carefully.
20 Considered the, the guidelines that were, were given to
21 us by the various attorneys and, and attorneys
22 representing the different entities. Our decision
23 wasn't arbitrary and capricious. We weighed on it very
24 heavily. And we made the decision based on the
25 guidelines that we were constrained by.

1 Today, the issue in front of us is the same.
2 We have a fairly narrow focus. Okay, we're not weighing
3 what the, the decision of the executive director was,
4 was accurate or not accurate. We're weighing whether or
5 not to stay the, the motion for the Sierra Club.

6 And based on the four criteria that they
7 need to satisfy, I do not believe they've met all four.
8 And therefore I want to issue a motion that we deny
9 Sierra Club's motion for the stay on both the IPP and
10 the Sevier, Sevier County power plant.

11 (There was a second to the motion.)

12 THE CHAIR: Okay, we have a motion and a
13 second. We've been discussing this for about an hour
14 and 20 minutes or so. Are we ready for a vote?

15 MR. GROVER: I'm almost out of water, so.

16 THE CHAIR: Okay. We have a motion that
17 would deny the request for a stay. All in favor of the
18 motion?

19 (A vote was taken.)

20 UNKNOWN SPEAKER: Keep your hands up,
21 please.

22 THE CHAIR: Opposed? And the Chair is not
23 voting.

24 UNKNOWN SPEAKER: Only one opposed?

25 THE CHAIR: One opposed. And the Chair is

1 not voting.

2 UNKNOWN SPEAKER: Did anyone not vote?

3 MR. WESSMAN: The Chair did not vote, and
4 Mr. Wessman recused.

5 UNKNOWN SPEAKER: Okay, thank you.

6 THE CHAIR: All right. I think we have a
7 decision of the Board. Thank everyone for their
8 participation.

9 MR. HALEY: Thank you very much.

10 MS. WALKER: Just, Fred, just as a matter of
11 process, are you going to do another order that will be
12 signed soon?

13 MR. NELSON: Yes. I, I think it will be
14 a simple order. I'm not sure it needs to be brought
15 back to the Board. And so we'll just get an order
16 signed and, and I'll send it up to Mr. Veranth. It will
17 just be more of a procedural order. Did you have a time
18 frame that you were interested in getting that done by?

19 MS. WALKER: As long as it's soon, that's
20 fine with me.

21 MR. NELSON: Okay. "Soon" being? I mean...

22 MS. WALKER: Well, what do you mean by soon?
23 A week?

24 MR. NELSON: I was gonna work with that
25 effort, yeah.

1 MS. WALKER: Okay. And, and then just
2 another practical question. Is the transcript of
3 today's hearing gonna be made part of the record?

4 MR. NELSON: We could do that. I think it's
5 probably up to you to -- if that's your request, we
6 could do that.

7 MS. WALKER: Okay.

8 MR. NELSON: I mean, it -- I have to file a
9 transcript index -- or a record index by, I believe the
10 time frame the court set is 20 days from the time you
11 filed, and that means by next Monday. So what I may
12 have to do is file that record index, and then
13 supplement it.

14 MS. WALKER: Okay.

15 MR. NELSON: At a later time.

16 MS. WALKER: Well, I -- we would request
17 that this -- the hearing transcript be part of the
18 record. And if I need to do something to make -- to
19 facilitate that, if you would let me know.

20 MR. NELSON: I don't think you will. I
21 think we're going to get a copy of it, so that, that
22 will meet that requirement.

23 MS. WALKER: Okay. Thank you very much.

24 (The hearing on this matter was concluded at 3:12 p.m.)

25

C E R T I F I C A T E

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

This is to certify that the foregoing proceedings were taken before me, KELLY L. WILBURN, a Registered Professional Reporter and Notary Public in and for the State of Utah.

That the proceedings were reported by me in stenotype and thereafter caused by me to be transcribed into typewriting. And that a full, true, and correct transcription of said proceedings so taken and transcribed is set forth in the foregoing pages, numbered 1 through 68, inclusive.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action, and that I am not interested in the event thereof.

WITNESS MY HAND AND OFFICIAL SEAL AT KEARNS, UTAH
THIS 8th DAY OF June, 2005.

Kelly L. Wilburn
Kelly L. Wilburn, CSR, RPR
My Commission Expires:
May 16, 2009







\$	according - 27:1, 30:13 Accordingly - 7:22 account - 21:6 accurate - 88:4 accustomed - 34:24 acquire - 31:4 acquired - 17:8 acronym - 23:19 Act - 6:9, 18:10, 32:3, 32:5, 32:8, 40:11, 40:19, 41:6, 62:7, 62:15 act - 81:7 action - 7:10, 7:24, 27:18, 28:3, 28:17, 38:16, 41:12, 41:16, 41:18, 59:2, 69:12 actions - 8:4, 14:13 activities - 8:23, 9:2, 11:9 actual - 62:11 addition - 11:22 additional - 18:16, 43:11, 45:18 address - 12:4, 24:17, 34:20, 35:6, 45:16 addressed - 11:24 addresses - 33:19, 38:19 adequate - 7:12, 24:22 adjudicating - 48:7 adjudication - 12:7 administrative - 6:11, 8:25, 14:24, 27:12, 27:22, 40:21, 43:14, 60:15, 62:11, 62:19, 62:25 Administrative - 19:12, 40:18 admt - 58:6 adverse - 15:6, 15:10 advocacy - 9:3, 52:9 advocate - 11:16 advocates - 49:23 affect - 38:21, 49:11, 57:5 affected - 6:12, 6:19, 7:11, 7:20 afforded - 45:14 afternoon - 18:11, 24:14, 24:18 Agency - 23:20 agency - 28:3, 28:17, 30:11, 38:16, 49:23 agency's - 30:13 ago - 2:10, 5:25, 28:20, 46:16, 49:1, 63:16 agree - 18:16, 56:15, 64:8, 65:12 agreements - 20:25, 21:13 ahead - 13:1, 31:11 air - 17:9, 38:6, 49:11, 50:13, 50:17, 50:23, 51:1, 51:5, 51:7, 51:13, 52:1, 52:16, 52:17 Air - 1:1, 6:9, 14:21, 18:10, 27:10, 27:24, 28:1, 32:3, 32:5, 32:8, 32:11, 32:17, 32:20, 32:21, 38:14, 40:11, 41:6, 49:8, 50:12, 58:16, 62:7, 62:15 albeit - 25:21 Albert - 32:22 alleged - 7:21, 27:6 allow - 8:10, 9:16, 21:13, 27:19, 32:24, 65:2 allowed - 6:13, 6:20, 11:7, 24:9, 26:21, 33:5, 33:18 allows - 18:17 almost - 66:15 alternatives - 7:15 amicus - 11:5, 11:8, 11:12, 11:25, 25:20, 46:21, 46:25, 47:1, 47:3, 47:10 Amicus - 47:15 amount - 16:10, 44:16, 49:13, 55:22, 58:8 analogy - 63:4 analysis - 8:9, 20:8, 20:14, 21:5 and-a-half - 20:9, 64:5 anytime - 26:23, 27:3 anyway - 61:10 apologize - 47:22 appeal - 5:11, 10:17, 10:18, 12:13, 16:3, 16:8, 19:18, 20:10, 22:21, 26:20, 35:8, 35:10, 36:10, 36:25, 37:6, 38:14, 45:23, 48:3, 48:8, 58:10, 59:11, 61:8 appealed - 2:15, 3:6, 18:7, 22:10 appealing - 2:17, 2:18, 46:19 Appeals - 1:4, 5:12, 13:7, 15:18, 19:17, 19:19, 19:24, 19:25, 22:11, 22:14, 27:4, 28:6, 28:13, 29:11, 30:2, 31:19, 31:22, 33:19, 33:24, 34:2, 37:9, 42:7, 43:7, 44:11, 44:13, 44:21, 46:9, 59:15 appeals - 2:4, 25:24, 27:14, 28:2, 36:2 Appeals' - 61:6 appellate - 3:7, 5:21, 13:24, 29:9, 41:18, 44:17, 45:13, 57:5, 60:16 Appellate - 19:21 appellate - 13:16 applicant - 7:23, 18:6 applicants - 7:11, 6:4, 31:3, 33:25, 34:9, 56:23 application - 17:10, 19:22, 62:17 applied - 29:17, 29:18, 50:2 applies - 6:23, 26:4, 40:13 apply - 6:1, 6:2, 28:23, 29:9, 34:21, 40:16 appreciate - 24:17, 32:12, 61:22 approach - 27:21 appropriate - 4:2, 4:4, 4:26, 6:3, 5:4, 5:7, 15:22, 22:7, 22:11, 22:15, 57:9, 62:22 approval - 17:11, 18:3, 28:1, 36:10 approve - 8:14, 13:2, 13:3 approved - 3:1, 7:10, 30:18, 31:1 arbitrary - 13:10, 29:9, 65:23 area - 48:1 areas - 51:11, 54:25 argue - 22:3, 22:14, 26:14, 27:17, 28:24, 46:8 argued - 23:5 arguing - 60:9 argument - 10:12, 10:15 arguments - 10:8, 10:10, 22:25, 26:7, 26:8, 33:21, 50:13, 50:22, 50:24, 52:6, 58:13 arise - 9:3, 11:18 Article - 8:6 articulated - 19:8, 38:9 aspects - 54:2, 63:13 assessment - 39:10 assignment - 18:8 assistant - 24:18 associated - 69:11 assume - 10:23, 11:1 assuming - 53:18 assure - 43:9 attempt - 4:13 attention - 13:14, 61:15 Attorney - 63:3 attorneys - 24:16, 57:4, 65:21 authority - 13:3, 32:7, 57:15 authorizes - 42:22 available - 8:4, 13:24, 15:9, 17:22, 45:15, 48:22, 49:14, 59:23 aware - 5:13, 20:17 awhile - 48:15, 65:13	B background - 23:10 backtrack - 9:16 balance - 58:3, 58:5, 58:7, 62:16, 63:21 Bart - 49:15 base - 42:24 based - 8:9, 12:9, 14:2, 16:24, 32:22, 37:21, 38:8, 64:22, 65:24, 66:6 basis - 22:24, 23:5, 30:2, 38:8, 38:13 become - 28:25, 64:18 bed - 17:17 begin - 11:4, 17:24, 28:8, 35:24 begs - 26:24 behalf - 49:4, 61:1 behind - 10:16, 19:3	believes - 7:17, 8:2 benefit - 4:12, 16:21, 42:17, 64:19 best - 12:4, 12:8, 30:15, 47:4, 48:21, 49:13, 58:1 better - 12:3, 25:13, 34:19, 58:25 between - 47:3 beyond - 18:25 big - 17:12, 41:6, 49:11, 56:7 bigger - 16:11 black - 68:6 board - 19:22, 46:20, 48:15, 49:25, 50:18, 65:14 Board - 1:1, 2:9, 2:15, 2:19, 2:20, 2:21, 2:24, 3:1, 3:4, 3:9, 3:10, 3:17, 4:8, 4:23, 5:1, 6:24, 8:17, 8:21, 9:24, 10:3, 10:4, 11:10, 11:16, 14:7, 14:21, 17:2, 22:9, 22:22, 23:3, 24:18, 24:22, 25:11, 25:12, 25:16, 26:12, 27:19, 28:20, 29:5, 29:12, 29:14, 29:19, 32:19, 32:20, 32:21, 33:12, 33:24, 35:2, 36:1, 36:4, 38:4, 38:11, 38:23, 39:7, 39:21, 40:13, 40:15, 40:16, 40:20, 40:25, 41:10, 42:8, 46:17, 47:16, 48:7, 48:25, 49:5, 50:8, 50:11, 50:12, 53:13, 54:17, 55:8, 55:10, 58:19, 57:5, 57:13, 57:14, 59:2, 59:7, 59:16, 59:22, 60:2, 60:13, 60:19, 60:21, 62:24, 63:9, 63:16, 64:8, 64:14, 64:20, 64:23, 65:19, 67:7, 67:15 Board's - 29:21, 33:6 body - 14:20, 19:11 bond - 16:5, 16:6, 16:8, 16:12, 16:15, 16:18, 16:21, 19:25, 22:15, 22:20, 31:16, 31:24, 44:13, 44:19, 45:9, 45:14, 46:10 bonding - 19:14, 46:6 bonds - 31:12, 31:13, 31:25 Bountiful - 17:7 brief - 18:15, 20:13, 30:7, 47:11, 62:2 briefing - 37:3 briefings - 36:25 briefly - 17:2, 20:7, 20:13, 25:1, 25:17 briefs - 47:12, 53:24 bring - 13:8, 64:23 brought - 40:4, 41:16, 48:21, 67:14 bulld - 2:12, 2:13, 23:14, 31:4 building - 34:9 built - 26:21, 26:23, 27:3, 48:18, 48:22 Bunker - 63:17, 53:25, 54:10, 54:13, 54:16, 54:18, 55:3
-----------	--	---	---

55:8, 55:12 burden - 18:21, 22:4 Burwell - 17:1, 17:12, 17:23, 23:8, 23:15, 23:19, 23:21, 23:24, 24:3, 24:7, 38:4, 38:11, 39:4, 39:10, 39:15, 50:9, 51:25, 52:4, 52:8 button - 64:4	clauses - 21:12 clean - 17:20 Clean - 8:9, 18:9, 32:3, 32:5, 32:8, 40:11, 41:5, 62:7, 62:15 clear - 5:9, 19:17, 21:17, 58:22 clear-cut - 58:22 clearly - 4:13 client - 15:11, 22:17 Club - 2:16, 2:22, 3:4, 3:8, 3:22, 4:5, 4:19, 8:10, 7:1, 8:19, 8:24, 9:1, 9:17, 9:20, 10:5, 10:13, 11:8, 11:15, 11:17, 12:10, 12:12, 14:17, 15:5, 18:13, 18:19, 19:18, 20:8, 22:3, 22:10, 25:20, 26:8, 26:11, 28:19, 27:1, 27:7, 27:10, 27:17, 28:7, 28:21, 28:15, 30:21, 31:21, 32:10, 33:4, 33:14, 33:21, 33:22, 34:11, 34:14, 34:25, 38:24, 39:23, 41:17, 48:10, 48:18, 48:9, 48:10, 48:25, 52:5, 58:20, 58:14, 60:7, 60:17, 61:18, 63:13, 63:23, 64:10, 64:17, 64:19, 66:5 Club's - 19:3, 26:17, 66:9 coal - 2:13, 17:16, 17:18, 18:13, 20:18, 21:1, 21:10, 31:4, 48:13, 48:22, 62:18 coal-fired - 2:13, 62:18 coals - 21:12 coming - 84:9 comment - 7:13, 7:18, 32:11, 33:1, 48:24, 49:22, 50:10, 57:12, 57:18 comments - 4:8, 18:18, 26:1, 32:10, 32:25, 43:23, 47:11, 48:14, 53:18, 61:23 Commission - 69:16 community - 20:24, 57:21 companies - 35:19, 44:9, 45:8, 58:18 Company - 2:13, 2:18, 2:23, 3:18, 3:22, 4:6, 12:17, 17:3, 17:4, 48:26, 59:11 company - 17:5, 23:9, 23:10, 35:23, 43:10, 47:9 compelling - 5:17 complaining - 42:8 completely - 33:8 completion - 30:18 compliance - 28:4 complicated - 40:5, 50:5 comply - 39:14 compromise - 58:1 compromised - 7:19 con - 53:20 concept - 8:2 concerns - 7:16 concluded - 58:24 conclusion - 8:15	concurrent - 60:5 Condition - 35:10, 36:18 conduct - 13:9, 33:13 confidentiality - 21:12 confusing - 34:19, 40:3, 41:2, 41:8 Congress - 8:2 consider - 19:25 considerable - 58:18 consideration - 56:5 considered - 3:4, 44:20 Considered - 65:20 consistent - 3:18, 14:3, 62:7, 62:14 Constitution - 8:7 constitution - 8:8 constrained - 65:25 construct - 18:3, 35:20, 38:5, 42:22 constructed - 44:5 constructing - 34:16 construction - 17:24, 30:25, 31:7, 34:8, 35:21, 35:25, 38:11, 43:18, 49:8 contemplated - 27:21 contested - 44:23 context - 11:11 continue - 21:7, 45:24 contracts - 21:11, 46:13 control - 55:23, 63:6 controlled - 23:4 controlling - 23:2 controls - 18:19 convince - 14:16, 18:13, 18:18, 26:12 copy - 54:14, 68:21 correct - 29:8, 35:11, 35:12, 35:19, 45:4, 52:22, 58:24, 62:8, 69:8 correctly - 46:21, 50:1, 50:2 corresponding - 21:21 cost - 15:1, 15:4, 16:8, 18:11, 20:8, 20:21, 21:2, 21:10, 22:17 Council - 12:18 counsel - 4:25 County - 23:13, 28:2, 28:3, 66:10, 69:3 Couple - 48:14 couple - 18:17, 21:7, 50:14 course - 9:4, 19:2, 22:21, 32:12, 44:15, 48:17 court - 3:7, 4:12, 5:21, 12:20, 13:4, 13:8, 13:9, 14:16, 14:22, 16:19, 16:22, 19:10, 29:9, 38:25, 38:1, 40:17, 41:12, 41:15, 41:18, 41:24, 44:3, 44:15, 45:13, 50:6, 53:8, 53:13	57:7, 58:24, 59:3, 59:5, 60:16, 68:10 Court - 4:17, 5:11, 5:12, 6:17, 13:7, 15:18, 19:17, 19:19, 19:24, 22:11, 22:14, 23:4, 27:3, 28:8, 28:12, 29:11, 30:2, 31:19, 31:22, 33:19, 33:24, 34:2, 37:8, 41:13, 42:7, 43:7, 44:11, 44:12, 44:21, 48:8, 58:21, 59:16, 61:4 courts - 5:20, 6:3, 6:8, 7:2, 7:8, 8:12, 8:16, 12:3, 12:7, 14:6, 23:3, 34:19, 34:24, 38:23, 40:8, 40:7, 40:18, 40:19, 40:24, 53:2, 60:9, 65:9 cover - 22:20, 25:17 covering - 28:16 creep - 21:7 criteria - 63:12, 53:18, 58:25, 66:6 critical - 8:10 cross - 9:8, 47:7 Car - 1:12, 69:15 current - 43:10 cut - 58:22	35:23, 48:8, 53:10, 59:22, 60:11, 64:13, 64:15, 64:16, 64:22, 65:9 declare - 58:14 defend - 42:2 defending - 51:22 deference - 29:11, 29:19, 29:23, 53:8 degree - 26:15, 58:4, 58:10 delay - 10:10, 20:15, 21:1, 31:3, 42:9, 45:5, 48:11 delayed - 34:15 delaying - 10:6, 20:9, 20:20, 21:9, 21:25, 62:12 delays - 62:24 Delta - 23:12 demonstrate - 47:18, 47:19, 53:11 demonstrated - 63:14 denial - 19:3, 22:8, 26:3, 25:10, 58:20 denials - 27:4 denied - 2:24, 10:14, 16:24, 18:16, 19:23, 23:7, 48:26, 59:25 denies - 39:22 deny - 7:1, 25:12, 25:13, 66:8, 66:17 denying - 7:2, 39:23, 41:21, 59:7, 60:13 Department - 38:14 depositions - 9:23 depth - 54:4 describe - 17:2, 23:8, 47:4, 59:5 describing - 64:7 description - 4:1, 60:22 determination - 30:14, 37:10, 37:19, 58:16, 61:5 determinations - 6:13, 28:13, 58:4 determine - 5:20, 6:4, 13:9, 37:17, 41:17, 51:16, 51:18, 57:8, 65:17 determined - 8:10, 28:20, 37:18 determines - 28:8 detrimental - 45:6 developed - 17:9 Development - 50:11 devoted - 49:12 difference - 45:8, 48:19, 47:3 different - 11:12, 39:16, 44:18, 54:2, 60:9, 60:10, 63:18, 65:22 differently - 60:8 difficult - 9:15, 14:1 direct - 9:6 director - 66:3 disagreement - 60:21 disclose - 21:14 discovery - 9:2, 9:21, 11:16, 30:23 discretion - 30:7, 47:16 discretionary -
---	--	---	--	--

<p>25:11, 30:5 discuss - 20:13, 21:13 discussed - 53:16, 53:19, 54:2, 54:11 discussing - 66:13 discussion - 2:7, 48:22, 50:7, 51:23, 54:7, 54:19, 54:24, 55:15 discussions - 27:20, 48:20 disparate - 39:17 dispute - 27:15 dissent - 8:17 distinct - 39:17 distinctly - 4:14 Dhl - 28:1 Division - 26:5, 27:10, 27:24, 28:1, 32:11, 32:17 document - 37:5 dollars - 20:22, 21:3, 21:20, 22:18, 58:18 done - 14:13, 17:9, 24:22, 28:15, 41:21, 67:18 down - 2:14, 18:2, 24:20, 28:2, 31:9, 45:1 downwards - 21:8 draw - 81:16 driven - 15:9 due - 23:1 dunker - 15:23 during - 13:24, 30:8, 30:12, 32:10, 38:19, 49:21, 51:24, 61:10 dust - 49:9 duty - 5:21, 57:19</p>	<p>enforce - 51:1 enjoins - 27:18 ensure - 6:22, 7:12 enter - 20:25 entire - 41:5 entities - 8:25, 39:17, 65:18, 65:22 entitled - 18:10, 33:9, 65:6 entity - 23:12, 40:19 environment - 26:19, 55:18, 55:17, 55:24, 57:19, 58:21, 62:23 environmental - 7:15, 31:15, 52:6, 52:22, 56:8 environmentally - 62:6 envision - 67:21 Epa - 8:11, 8:15, 7:7, 7:17, 8:1, 23:1, 32:2, 32:3, 32:8, 32:7, 40:4, 40:10, 40:23 Epa's - 8:9, 23:1 err - 15:19 Especially - 20:22 essentially - 7:2, 8:25, 19:9, 29:22, 30:1, 30:13, 30:19, 30:22, 31:18, 32:4, 33:7, 38:13, 39:8, 39:13, 39:22, 40:12, 40:22, 41:20 establish - 2:20, 20:4, 22:8 established - 7:5 establishing - 18:22, 19:5, 22:4, 63:18 event - 45:10, 69:12 evidence - 9:7, 13:8, 13:12, 15:19, 15:21, 60:1 exact - 21:11 exactly - 51:16 Exactly - 44:8 examination - 9:8 examine - 47:8 examined - 47:24 example - 11:13, 31:22 except - 34:10 Except - 64:9 excluded - 11:15, 34:11 Executive - 2:11, 3:22, 4:7, 24:16, 25:5, 25:18, 26:5, 27:8, 27:9, 27:23, 28:4, 28:9, 35:18, 42:23, 45:3, 47:9, 48:2, 58:5, 58:12, 58:17, 58:18, 62:6, 62:13, 64:2 executive - 68:3 exhaust - 6:26, 40:21 exist - 48:1, 58:11 existence - 27:17 existing - 7:8, 23:13, 58:2 expected - 47:25 expensive - 18:12 expertise - 6:4, 8:16 experts - 51:12 Expires - 69:16 explain - 5:16 explained - 5:9 explored - 54:25 extensive - 4:23</p>	<p>26:1 extent - 29:24 extra - 45:5 eyes - 28:11</p> <p>F</p> <p>facilitate - 68:19 facilities - 31:1, 31:8, 34:17 facility - 17:16 fact - 12:3, 18:2, 26:17, 33:14, 42:11, 50:16, 58:8, 62:14 factor - 12:5, 41:7 factored - 26:6 factors - 5:15 facts - 29:15, 29:18, 29:18, 34:21, 64:22 fall - 14:15, 22:5, 45:10, 45:12 failed - 14:9, 22:4 failure - 7:21, 19:4, 25:8 fair - 9:17 fairness - 20:2 fairly - 54:24, 65:16, 66:2 fairness - 10:18, 40:9 fall - 2:11 far - 4:4, 14:17, 15:3, 31:10 fatal - 25:9 favor - 68:17 favored - 14:5 favors - 12:13 fear - 27:2 Federal - 6:16 federal - 39:14 few - 20:18, 21:4, 25:2 fifth - 10:8 figure - 6:8 file - 47:7, 47:12, 47:13, 68:6, 68:12 filed - 3:4, 3:8, 3:24, 19:18, 28:2, 41:20, 41:25, 61:8, 62:2, 68:11 filing - 18:5 final - 28:5, 34:18, 35:24 finally - 4:8, 13:2 financial - 20:24 financing - 35:23, 42:25 fine - 42:7, 67:20 finger - 64:3 finished - 24:11 Finlinson - 12:15, 12:18, 17:1, 17:4, 17:14, 17:25, 18:16, 19:14, 24:21, 42:18, 42:19, 43:23, 44:1, 44:6, 44:12, 51:26, 63:12 fired - 2:13, 62:18 first - 4:6, 8:19, 8:24, 18:25, 30:16, 31:13, 37:12, 37:15, 37:21, 42:24, 61:2 First - 49:2 flag - 4:15 flip - 30:24 fluidized - 17:17 flux - 38:15 focus - 30:17, 39:13, 65:16, 68:2 follow - 61:8</p>	<p>followed - 4:5, 58:13 force - 28:10 forced - 22:20, 31:21, 31:23 foraging - 69:5, 69:9 forgetting - 38:17 form - 64:14, 65:10 formally - 27:19 forth - 12:23, 50:14, 69:9 forum - 7:26 forums - 49:20 forward - 8:20, 8:23, 10:11, 11:11, 21:25, 29:18, 30:21, 42:12, 42:21, 45:24, 59:8, 69:12, 80:18, 85:2 four - 3:20, 3:24, 5:13, 6:17, 5:25, 14:1, 14:2, 14:9, 18:22, 19:7, 22:5, 22:8, 25:7, 25:17, 30:20, 31:14, 44:22, 53:11, 53:12, 61:15, 61:18, 61:19, 66:8, 68:7 four-part - 5:13, 6:17, 14:1, 14:9, 30:20, 31:14, 44:22, 61:15, 61:19 fourth - 9:19, 12:5, 15:12, 41:7 frame - 61:11, 67:18, 68:10 Fred - 2:4, 4:19, 5:9, 52:22, 61:14, 64:7, 67:10 freezes - 63:8 front - 19:22, 66:1 full - 11:8, 11:11, 11:14, 12:1, 25:22, 33:9, 33:16, 41:23, 57:8, 65:6, 69:8 full-party - 11:11, 11:14, 12:1, 33:9, 33:16 fully - 10:7, 47:6, 57:19 function - 55:25</p> <p>G</p> <p>general - 24:16 Generals - 63:4 generated - 21:22 generating - 17:16 generation - 2:13, 22:2 George - 18:11, 61:1 giant - 28:25, 31:24 given - 5:15, 6:8, 29:17, 29:23, 34:7, 34:15, 65:20 global - 58:7 goals - 50:20 gonna - 9:1, 9:20, 9:21, 9:22, 11:1, 14:12, 14:17, 16:11, 17:25, 20:7, 21:22, 31:2, 31:3, 31:21, 44:4, 44:10, 44:15, 50:4, 60:24, 61:10, 63:9, 64:1, 67:24, 68:3 goodness - 37:1 governed - 12:24 governing - 25:3 government -</p>	<p>23:15, 64:3 governmental - 23:11, 23:18 Grand - 4:19, 29:15, 39:15 grant - 2:20, 25:14, 25:16, 26:16, 30:11, 34:1, 37:22, 44:25, 46:8, 47:1, 60:14 granted - 3:1, 3:2, 13:25, 14:6, 14:7, 17:11, 25:20, 27:16, 33:15, 42:23, 45:3, 48:26, 47:15, 58:12 granting - 16:16, 25:3, 25:10, 44:20, 53:7, 58:17, 62:24, 63:5 grapple - 6:8 greater - 16:9 ground - 9:10 group - 2:16, 2:17, 11:24 Group - 3:3, 48:12, 59:12 groups - 3:21, 6:10, 31:16, 31:24 Grover - 35:8, 38:15, 38:23, 37:4, 37:7, 37:13, 37:17, 37:25, 51:4, 52:2, 52:5, 52:9, 53:23, 54:3, 54:12, 54:21, 58:2, 58:22, 62:3, 68:15 Grover's - 53:17 growing - 22:1 guarantee - 31:20 guarded - 13:24 guess - 25:13, 43:10, 57:4, 57:11 guidance - 50:4 guidelines - 65:20, 65:25</p> <p>H</p> <p>Halley - 18:11, 18:12, 20:12, 21:15, 23:11, 23:17, 24:8, 24:21, 26:11, 43:18, 43:20, 43:22, 45:18, 61:1, 67:8 half - 20:9, 64:5 halt - 14:25 hampered - 33:13 Hand - 69:13 handle - 3:17 handled - 40:6 hands - 28:11, 66:20 happy - 42:13 hard - 14:12, 26:14 hardware - 38:21 Harm - 51:25, 52:3 harm - 10:9, 12:9, 12:10, 14:11, 14:12, 15:4, 19:1, 19:6, 20:14, 21:8, 21:17, 22:20, 26:16, 26:18, 26:19, 27:22, 27:2, 30:16, 30:17, 30:19, 30:20, 30:22, 33:4, 34:10, 34:14, 44:8, 51:5, 51:9, 51:18, 51:19, 51:25, 52:1, 52:6, 52:13, 52:15, 52:18, 52:22, 62:25, 58:19, 61:20 harm - 8:19, 11:7</p>
---	--	---	---	--

26:13, 26:15, 31:3, 58:17
 harmful - 63:24
 harms - 63:22, 64:1
 hate - 55:25
 healthy - 55:24, 57:24, 57:25
 hear - 3:25, 39:24, 59:9, 59:11
 heard - 2:22, 5:11, 6:24, 15:15, 15:20, 18:23
 hearing - 4:14, 68:3, 68:17, 68:24
 Hearing - 1:7
 hearings - 26:2, 50:2, 51:15
 heavily - 65:24
 held - 53:21
 help - 41:7
 higher - 20:6, 26:15
 hitting - 63:5, 64:3
 hold - 18:6, 42:6, 44:10
 holding - 15:11, 17:5, 64:24
 holds - 32:7
 hope - 38:21
 hoping - 4:22
 Horrocks - 39:19, 39:20, 65:11, 65:12
 hour - 66:13
 huge - 20:21
 hundreds - 21:3, 21:19, 22:18
 Huntington - 17:19
 hurdle - 28:25
 hurry - 37:18

I

idea - 10:16, 32:18
 immunity - 23:18
 impact - 20:21, 21:18, 33:18, 38:8, 50:14, 50:18, 50:23, 63:10, 65:3
 impacts - 38:20, 50:25
 implement - 32:8
 implementation - 6:18, 32:5
 implementing - 41:5
 importance - 28:18
 important - 4:1, 27:9
 inches - 53:24
 include - 9:2
 including - 6:18, 7:14, 64:17
 including - 8:5, 61:19
 inclusive - 69:10
 increase - 21:21, 21:23
 increased - 20:18
 increasing - 22:2
 incur - 34:14, 48:11
 incurred - 20:16
 indefinite - 20:11
 independent - 32:18, 32:23, 32:24
 independently - 32:19
 index - 68:9, 68:12
 indicated - 45:7, 46:17, 53:8, 64:23, 62:3
 indicating - 62:3

individual - 18:13
 industry - 55:15, 55:18
 inefficient - 46:5
 inflation - 21:5
 influence - 9:11, 65:3, 65:4, 65:10
 information - 26:7, 42:20, 47:13, 60:7, 60:7
 ingrained - 64:18
 initial - 39:20
 initiative - 9:8, 49:16
 injunction - 19:9
 injury - 14:16, 14:18, 19:4, 27:7
 input - 32:22, 49:22, 50:7
 instead - 17:17
 intended - 8:2
 intent - 25:26
 interact - 41:24
 interest - 21:4
 interest - 12:11, 15:7, 15:10, 21:6, 21:7, 21:23, 28:10, 31:16, 31:24
 interested - 3:21, 87:18, 89:12
 interesting - 62:2
 interfere - 27:13
 interference - 27:25
 intermountain - 18:10, 23:20, 25:24, 43:11, 63:25
 interpretation - 48:21, 48:23, 68:15
 interpreted - 50:1
 interpreter - 32:3
 interprets - 7:8
 intervene - 2:22, 2:23, 3:2, 3:8, 3:19, 59:5, 59:19
 intervention - 2:20, 47:20
 invalid - 10:24
 inventories - 48:1
 involved - 9:25, 33:14, 49:7, 62:8
 involvement - 2:6
 involving - 56:11
 ipa - 18:12, 18:13, 20:6, 23:11, 23:19, 23:25, 61:1
 ipa/ipp - 43:22
 ipp - 1:4, 2:4, 2:12, 2:24, 3:14, 3:22, 4:6, 35:7, 36:3, 36:4, 36:5, 36:17, 38:18, 47:1, 59:9, 68:9
 ipp's - 35:10
 irrelevant - 31:5
 irrefragable - 14:11, 14:17, 19:1, 19:8, 26:16, 52:15, 61:20
 issuance - 29:1
 issue - 40:8
 issue - 3:12, 6:8, 6:17, 9:13, 9:19, 11:6, 12:23, 14:14, 18:5, 19:14, 22:12, 26:6, 28:17, 30:16, 30:19, 31:12, 31:13, 31:18, 33:8, 33:20, 34:4, 34:18, 34:23, 36:22, 37:10, 40:4, 41:6, 43:13, 45:13, 45:21, 45:24, 49:6, 58:14, 61:16, 61:20, 62:6

62:20, 66:1, 68:8
 issued - 2:11, 2:25, 19:2, 20:1, 28:20, 28:5, 35:14, 35:18, 35:17, 36:8, 45:22, 46:2, 55:20, 51:9
 issues - 7:13, 9:3, 9:23, 10:2, 10:4, 11:18, 11:23, 11:24, 12:5, 13:23, 16:25, 25:2, 28:4, 28:4, 28:18, 28:21, 28:22, 28:25, 38:8, 41:2, 45:2, 45:25, 48:6, 47:12, 48:20, 48:23, 49:1, 49:18, 51:7, 56:24, 58:18, 60:4, 60:10, 61:17
 issuing - 63:17
 item - 15:25
 item - 2:3
 itself - 9:6

J

Jerry - 35:4
 job - 5:19, 24:22, 28:16, 55:15, 55:18
 John - 65:13
 joined - 50:11
 joins - 43:23
 Joro - 4:18
 judgment - 16:7
 judicial - 8:10, 7:9, 7:21, 7:24, 8:3, 8:11, 8:12, 14:4, 16:1, 30:12, 32:18, 33:6, 40:11, 43:15, 53:6
 June - 1:10, 2:1, 69:14
 jurisdiction - 5:23, 19:19, 33:23
 justice - 7:15
 justified - 14:2
 justify - 15:21

K

Kearns - 69:13
 keep - 66:20
 keep - 13:17
 Kelly - 1:12, 69:5, 68:15
 kin - 69:11
 kind - 16:12, 16:6, 19:10, 41:8, 47:14, 51:22, 56:2, 57:14, 60:3, 61:4, 62:15, 63:6
 knowledge - 51:14
 knows - 8:10, 20:10

L

lack - 12:10
 lacks - 13:18
 laid - 37:14, 38:17
 Lake - 1:9, 69:3
 Lance - 18:12
 land - 17:8
 last - 9:12, 20:18, 20:19, 28:25, 47:22, 48:19
 late - 39:6
 law - 6:22, 7:6, 7:8, 12:25, 13:14, 15:15, 19:11, 29:13, 29:17, 29:22, 39:14, 51:4, 51:7, 51:15, 51:21, 52:12, 58:25

laws - 66:13
 laying - 18:17
 least - 8:5, 21:18, 27:3, 53:24
 Lee - 18:12, 20:7, 20:12, 23:20, 23:22, 24:1, 24:5
 left - 38:3
 legal - 22:23, 35:25, 46:23, 47:14, 54:7, 53:13
 legitimate - 15:9
 less - 65:11
 level - 9:10, 28:22, 45:15
 lie - 63:21
 Light - 17:19
 lightly - 14:6, 14:7
 likelihood - 15:14, 45:12
 likely - 15:23, 27:16
 limited - 57:7
 limits - 52:21
 line - 18:9, 31:9
 listed - 53:5
 listening - 58:12
 literally - 21:2
 living - 57:21
 lock - 46:12
 long-term - 20:25, 46:13
 look - 15:12, 16:1, 51:5, 51:8, 51:9, 52:15, 52:18, 55:18, 59:23
 looked - 13:8, 15:14, 52:11
 looking - 21:26, 52:24, 60:8
 lost - 10:17
 low - 21:4
 lower - 19:5, 28:13
 lungs - 58:2

M

ma'am - 41:13
 main - 65:15, 65:18
 maintain - 53:8
 maintenance - 46:1
 major - 49:6, 49:18
 majority - 48:24, 49:3, 50:3, 55:8
 makers - 9:11
 mandate - 27:25
 Marcelle - 35:4
 market - 42:24
 markets - 48:12
 marriage - 53:5
 matter - 2:10, 3:14, 3:16, 3:21, 9:9, 11:22, 12:4, 12:5, 18:3, 27:6, 32:2, 32:6, 33:23, 35:1, 35:7, 35:22, 36:3, 38:25, 44:3, 57:14, 58:23, 61:8, 61:11, 63:8, 67:10, 68:24
 matters - 11:15, 34:4, 40:25, 41:3
 Mayor - 57:18
 mean - 6:23, 11:20, 23:18, 33:7, 33:12, 34:3, 38:10, 37:20, 48:22, 51:10, 51:22, 54:4, 56:6, 60:14, 67:21, 67:22, 68:8
 meaningful - 7:12
 means - 6:7, 29:11, 47:6, 58:7, 58:9

68:11
 meant - 40:3
 meantime - 34:17, 40:8, 42:5, 42:8
 meet - 13:16, 14:1, 14:8, 14:15, 22:4, 29:20, 53:12, 58:26, 68:22
 meeting - 47:22, 51:24, 65:15, 65:18
 meetings - 49:8
 meets - 28:1, 55:23, 62:17
 megawatt - 17:21
 megawatts - 17:15, 17:22
 member - 7:20, 38:24, 50:10
 members - 6:12, 6:20, 7:11, 8:5, 29:5, 35:2, 38:11, 41:10, 48:15, 60:8, 64:14, 66:14
 mentioned - 19:14, 39:15, 57:20
 mentions - 26:19
 merely - 10:9, 26:17, 33:4, 33:13
 merits - 12:6, 37:23
 met - 32:14, 41:7, 53:16, 61:18, 63:14, 66:7
 microphones - 4:15
 might - 9:3, 13:2
 Millard - 23:12, 23:13, 26:2
 million - 15:1, 16:9, 17:15, 20:23, 43:9
 millions - 20:22, 21:3, 21:19, 22:18, 58:18
 mind - 34:22
 minimal - 31:17, 44:14
 minimum - 21:19
 minute - 9:12, 60:6
 minutes - 4:22, 54:5, 54:6, 66:14
 misheard - 40:2
 miss - 39:24
 missed - 47:22
 mission - 58:21
 modified - 36:11
 modifying - 61:4
 moment - 20:13, 53:15
 Monday - 68:11
 money - 43:12
 monitoring - 17:10
 months - 2:10, 5:25, 14:23, 26:12, 28:20, 29:1, 48:16, 49:1, 63:15
 most - 6:2, 20:3, 57:22, 58:17
 motion - 3:13, 3:15, 9:2, 19:16, 19:23, 23:7, 26:17, 28:24, 39:2, 39:22, 50:8, 55:5, 59:5, 66:5, 66:8, 66:9, 66:11, 66:12, 66:16, 66:18
 Motion - 2:3
 motions - 2:22, 2:25, 3:4, 3:13, 3:18, 4:3, 8:3, 11:17, 47:7
 Motions - 1:4, 3:5
 motivation - 50:20
 mountain - 17:19
 moves - 21:1

Kelly L. Wilburn, CSR, RPR

DEPOMAX REPORTING SERVICES: (801) 328-1188/1-800-DEPOMAX

<p>must - 6:12, 6:19, 6:25, 7:23, 24:24, 25:8</p> <p>N</p> <p>name - 17:5, 18:4, 24:14</p> <p>narrow - 65:18, 66:2</p> <p>national - 38:21</p> <p>nature - 35:8</p> <p>necessarily - 38:21</p> <p>necessary - 8:16, 26:25, 61:7</p> <p>need - 4:13, 13:16, 21:24, 22:2, 22:5, 27:5, 58:5, 58:7, 58:22, 62:16, 65:5, 66:7, 68:18</p> <p>needs - 4:24, 32:13, 35:16, 57:14</p> <p>negotiated - 33:5</p> <p>negotiations - 33:11</p> <p>Nelson - 2:4, 2:9, 4:21, 5:6, 35:12, 35:15, 38:13, 38:16, 37:2, 37:5, 38:23, 39:2, 48:24, 48:2, 48:8, 48:11, 52:24, 54:14, 54:17, 54:19, 55:2, 55:4, 55:11, 57:12, 59:4, 61:22, 67:13, 67:21, 67:24, 68:4, 68:6, 68:15, 68:20</p> <p>net - 17:15, 17:21, 44:24</p> <p>Nevco - 17:8</p> <p>never - 5:24, 58:15</p> <p>new - 9:21, 9:22, 13:8, 17:1, 34:24, 38:4, 38:23, 50:10, 65:14</p> <p>New - 9:23</p> <p>next - 61:10, 68:11</p> <p>nice - 51:20</p> <p>Non - 27:11</p> <p>non - 27:25</p> <p>Non-parties - 27:11</p> <p>non-party's - 27:25</p> <p>none - 10:10</p> <p>None - 57:25</p> <p>normally - 5:7</p> <p>North - 1:8</p> <p>Notary - 69:6</p> <p>Nothing - 61:10</p> <p>notice - 25:25, 26:2</p> <p>notion - 11:3</p> <p>numbered - 69:10</p> <p>O</p> <p>objectives - 50:20</p> <p>obligation - 13:5, 25:15</p> <p>observation - 62:2</p> <p>obtain - 7:20, 7:21</p> <p>obviously - 56:15</p> <p>occur - 12:10, 12:11, 33:4</p> <p>occure - 30:23, 33:15</p> <p>offer - 42:20</p> <p>office - 63:4</p> <p>offices - 17:6</p> <p>Official - 69:13</p> <p>Once - 20:10</p> <p>once - 8:14, 20:10, 24:10, 39:6</p>	<p>One - 66:25</p> <p>one - 5:19, 9:11, 13:7, 14:1, 16:23, 18:25, 19:13, 22:6, 25:8, 31:8, 31:9, 34:16, 47:8, 47:21, 49:11, 51:8, 52:14, 54:21, 56:20, 58:22, 58:14, 60:12, 66:24</p> <p>ones - 17:7, 49:25</p> <p>open - 29:4, 30:14</p> <p>operate - 51:8</p> <p>opinions - 34:20, 44:18, 64:14, 65:10</p> <p>opportunities - 32:13</p> <p>opportunity - 7:9, 7:12, 7:17, 8:3, 9:7, 9:17, 10:17, 24:17, 60:1</p> <p>Opposed - 66:22</p> <p>opposed - 50:11, 66:24, 66:25</p> <p>option - 13:24, 14:5</p> <p>options - 17:8, 17:9, 60:20</p> <p>oral - 3:25, 47:11</p> <p>order - 2:21, 4:4, 7:12, 14:2, 20:23, 22:6, 22:9, 22:23, 24:24, 28:5, 28:21, 30:11, 36:10, 61:4, 61:8, 61:15, 65:5, 67:11, 67:14, 67:15, 67:17</p> <p>orders - 2:25, 3:3, 26:1, 54:16</p> <p>organization - 50:17, 50:23</p> <p>otherwise - 10:11, 10:19, 69:11</p> <p>ought - 13:4, 22:18, 44:19</p> <p>ourselves - 57:21</p> <p>outlined - 27:22</p> <p>outside - 53:14</p> <p>outweigh - 27:7</p> <p>outweighs - 15:4</p> <p>overcome - 29:21, 29:25, 30:4</p> <p>overly - 63:18</p> <p>own - 7:4, 9:8, 14:3, 26:17, 34:22, 49:16, 58:10, 69:24, 69:25</p> <p>owned - 17:5</p> <p>P</p> <p>Pacificorp - 2:6, 49:16</p> <p>packet - 54:14</p> <p>packets - 38:26</p> <p>page - 37:3</p> <p>pages - 69:9</p> <p>palpable - 19:4</p> <p>paper - 22:17</p> <p>parke - 38:21</p> <p>part - 5:13, 5:17, 8:24, 14:1, 14:9, 14:13, 15:24, 18:14, 30:20, 31:14, 33:10, 36:13, 36:16, 36:24, 44:22, 46:22, 48:3, 48:4, 53:8, 61:15, 61:19, 68:3, 68:17</p> <p>Part - 2:19</p> <p>partic - 26:23</p> <p>participate - 9:17, 10:7, 11:7, 11:17, 11:20, 25:21, 46:20</p>	<p>47:5, 47:8, 47:19</p> <p>participated - 26:23</p> <p>participating - 63:15, 65:6</p> <p>participation - 10:14, 47:15, 67:6</p> <p>particular - 8:13, 20:18, 58:11, 57:14, 59:10</p> <p>Particularly - 32:6</p> <p>particularly - 11:22, 29:14, 34:7, 34:15</p> <p>parties - 2:21, 6:24, 8:22, 10:11, 18:21, 24:21, 25:7, 28:22, 27:11, 27:14, 27:18, 27:21, 28:10, 28:11, 28:15, 29:8, 31:2, 34:8, 35:3, 47:9, 61:25, 62:3, 62:25, 63:1, 57:7, 60:9, 64:23, 64:26, 69:11</p> <p>Partnership - 49:8</p> <p>parts - 6:18, 14:2</p> <p>party - 5:15, 10:16, 11:8, 11:11, 11:14, 12:1, 13:18, 13:22, 18:21, 19:1, 25:22, 27:10, 28:7, 33:9, 33:16, 47:3, 47:5, 47:17, 54:8, 59:16, 60:2, 60:16, 64:11, 65:6</p> <p>party's - 27:25</p> <p>past - 21:2, 21:4, 21:7, 42:24</p> <p>pause - 63:5, 64:4</p> <p>pay - 13:13</p> <p>pedestrian - 63:4</p> <p>pendency - 30:8, 30:12</p> <p>pending - 36:4, 37:9, 61:4</p> <p>people - 5:2, 65:15</p> <p>per - 20:20</p> <p>percent - 20:20</p> <p>perform - 27:24</p> <p>perhaps - 61:13</p> <p>period - 20:11, 32:11, 33:1, 49:22, 57:7</p> <p>permit - 2:11, 2:12, 2:18, 6:15, 7:10, 7:11, 8:3, 8:4, 13:19, 18:1, 18:2, 18:3, 18:4, 18:10, 28:4, 30:19, 35:8, 35:13, 35:15, 35:17, 35:20, 35:24, 36:1, 36:2, 38:5, 38:6, 38:12, 42:22, 43:1, 43:2, 43:5, 43:8, 43:13, 43:17, 45:3, 45:4, 58:11, 57:6, 59:10, 62:11, 62:21</p> <p>permits - 2:15, 2:17, 6:19, 8:21, 8:17, 25:25, 26:6, 28:20, 31:1, 38:15, 40:12, 41:4, 55:20</p> <p>permitted - 27:12</p> <p>permitting - 7:14, 7:22, 7:24, 39:12, 47:23, 48:3, 62:18</p> <p>person - 16:8</p> <p>personally - 50:4</p> <p>persons - 7:23</p> <p>perspective - 13:17, 25:4, 25:18, 40:9, 45:17, 48:6, 64:1</p> <p>petition - 3:2, 5:11,</p>	<p>16:24, 41:20, 56:17, 59:18</p> <p>petitioned - 23:14</p> <p>petitioning - 51:20</p> <p>petitions - 3:8, 3:8</p> <p>piece - 22:16, 22:17, 42:20</p> <p>place - 44:26, 53:11, 53:15</p> <p>places - 18:20</p> <p>placing - 33:24</p> <p>plans - 6:18</p> <p>plant - 2:14, 24:5, 38:18, 38:19, 42:21, 44:4, 44:7, 48:22, 49:6, 62:16, 66:10</p> <p>plants - 17:18, 26:20, 26:22, 26:25, 27:2, 38:6, 38:7, 39:11, 47:25, 48:17, 48:18, 49:14, 49:15, 49:17, 50:15</p> <p>play - 18:19</p> <p>pleadings - 3:19, 3:20, 3:24, 4:23, 38:22</p> <p>plenty - 42:13</p> <p>plugged - 19:11</p> <p>Pm - 1:11, 2:1, 68:24</p> <p>point - 4:8, 18:4, 19:7, 19:20, 21:16, 22:10, 25:1, 27:9, 32:15, 35:16, 37:2, 40:22, 41:1, 48:1, 59:14, 59:17, 59:21, 63:11, 64:10</p> <p>pointed - 11:8</p> <p>pointing - 25:10, 26:10</p> <p>points - 4:1, 22:5, 22:8, 38:18, 54:8</p> <p>political - 23:22</p> <p>pollutants - 27:1, 58:9</p> <p>pollution - 55:22</p> <p>position - 12:3, 12:4, 12:6, 23:1, 42:2, 51:23, 52:10</p> <p>positioned - 34:20</p> <p>positions - 63:1</p> <p>possible - 57:9, 57:10, 58:1</p> <p>possibly - 20:24, 28:12, 32:16</p> <p>post - 22:20, 31:18, 31:23, 31:25, 46:10</p> <p>potential - 20:14, 20:21</p> <p>potentially - 38:21, 64:23</p> <p>power - 2:13, 5:21, 17:18, 21:22, 21:24, 22:2, 24:5, 38:8, 38:7, 44:4, 44:7, 44:9, 45:8, 48:18, 49:5, 49:15, 50:14, 59:6, 59:7, 58:18, 66:10</p> <p>Power - 1:4, 2:4, 2:13, 2:18, 2:23, 3:16, 3:22, 4:6, 12:17, 16:10, 17:2, 17:4, 17:19, 23:20, 25:19, 25:20, 25:24, 43:11, 48:25, 48:17, 59:11, 63:25</p> <p>practical - 35:22, 45:18, 61:8, 61:11, 68:2</p> <p>practices - 9:2</p>	<p>precedence - 60:10</p> <p>precedent - 60:3</p> <p>precipitated - 64:23</p> <p>precisely - 19:20</p> <p>precluded - 30:10</p> <p>predated - 49:15</p> <p>prefer - 61:17</p> <p>prej - 64:12</p> <p>prejudice - 10:20, 34:13</p> <p>prejudiced - 6:25, 35:1, 42:11</p> <p>prejudicial - 64:12</p> <p>preliminary - 19:9</p> <p>premise - 10:22, 10:23</p> <p>preparation - 9:4, 9:5, 11:19, 11:21</p> <p>present - 9:7, 47:6, 47:7, 47:10, 58:24, 60:1, 64:20, 65:15</p> <p>presentation - 39:21, 44:18</p> <p>presented - 10:12, 13:12, 38:5, 47:12, 48:5, 50:2, 64:15</p> <p>presenting - 28:21, 60:7</p> <p>presently - 43:3</p> <p>presents - 12:6, 28:17</p> <p>preserved - 10:18</p> <p>presumably - 26:25, 34:9</p> <p>presupposing - 66:3</p> <p>pretrial - 9:4, 11:19</p> <p>pretty - 13:15, 13:23, 15:3, 16:12, 17:20, 45:11</p> <p>prevail - 15:24, 16:18</p> <p>prevails - 59:15</p> <p>prevent - 58:20</p> <p>prevented - 34:16</p> <p>prevents - 16:14, 59:2</p> <p>previous - 38:24, 46:17</p> <p>price - 20:17, 20:19, 21:1, 21:12, 21:22, 21:24, 22:17</p> <p>private - 23:24</p> <p>pro - 53:20</p> <p>problem - 45:19</p> <p>procedural - 62:8, 67:17</p> <p>procedurally - 57:10</p> <p>Procedure - 19:11, 19:21</p> <p>procedure - 11:10, 44:18</p> <p>Procedures - 40:18</p> <p>procedures - 16:4</p> <p>proceed - 2:21, 4:2, 11:2, 20:3, 46:7</p> <p>proceeding - 2:23, 2:24, 6:5, 6:14, 7:1, 8:20, 8:23, 9:14, 9:18, 9:20, 10:7, 10:14, 12:12, 30:21, 31:8, 32:4, 32:15, 32:24, 33:18, 34:4, 34:5, 34:12, 40:17, 44:9, 45:1, 47:1, 47:2, 53:2, 59:13, 59:17</p> <p>Proceedings - 1:7</p> <p>proceedings - 3:5, 3:11, 3:14, 3:15, 5:10,</p>
--	--	---	--	---

<p>5:18, 8:11, 10:19, 12:14, 27:11, 28:8, 28:11, 37:8, 42:9, 42:12, 47:6, 48:5, 57:8, 59:8, 60:5, 60:15, 60:18, 60:19, 63:15, 69:5, 69:7, 69:9</p> <p>process - 5:7, 10:8, 10:10, 11:11, 12:20, 13:28, 13:25, 14:19, 15:9, 16:4, 16:13, 18:17, 17:18, 17:20, 27:22, 38:17, 37:14, 41:24, 43:3, 43:4, 43:14, 43:15, 43:17, 44:11, 44:17, 44:22, 47:18, 47:23, 48:3, 48:4, 53:8, 57:5, 59:24, 60:12, 60:14, 61:24, 62:20, 64:11, 64:24, 65:2, 67:11, processes - 8:11, 59:20</p> <p>procurement - 18:14</p> <p>production - 17:21</p> <p>Professional - 69:5</p> <p>project - 14:18, 15:1, 15:2, 16:9, 17:8, 17:12, 17:15, 18:5, 18:7, 20:15, 20:20, 20:21, 21:9, 21:20, 21:23, 30:18, 42:25, 50:25</p> <p>Project - 18:10, 43:11</p> <p>projects - 50:18, 50:24</p> <p>proposals - 31:10</p> <p>proposed - 7:16, 8:10</p> <p>protect - 16:8, 16:21, 27:23, 55:15, 55:16, 55:17, 57:19</p> <p>protecting - 58:21, 62:22</p> <p>protection - 16:14, 44:13, 45:9, 45:14</p> <p>prove - 19:4, 21:11</p> <p>proven - 49:19</p> <p>provide - 6:19, 30:7, 49:22, 62:15</p> <p>provided - 7:18, 32:11, 38:13, 38:22</p> <p>provision - 30:6, 36:5, 59:10</p> <p>provisions - 36:2</p> <p>prudent - 6:3</p> <p>Pub - 6:13, 6:15, 6:19, 7:10, 7:22, 7:24, 8:3, 40:11</p> <p>Public - 69:5</p> <p>public - 6:12, 6:20, 7:11, 7:13, 7:18, 7:20, 8:5, 8:11, 8:25, 10:3, 10:5, 11:20, 12:11, 14:14, 15:7, 15:10, 21:23, 28:10, 28:18, 28:22, 31:15, 31:24, 32:22, 33:1, 49:5, 49:18, 49:21, 52:9</p> <p>public's - 15:7</p> <p>pulverized - 17:16</p> <p>purauing - 58:20</p> <p>put - 10:10, 16:5, 16:12, 16:18, 17:7, 29:16, 42:25, 44:25, 50:14, 53:15</p>	<p>Q</p> <p>Quality - 1:1, 14:21, 27:10, 28:1, 32:12, 32:17, 32:20, 32:21, 38:14, 50:12, 56:19</p> <p>quality - 38:8, 49:11, 50:13, 50:18, 50:23, 61:2, 51:5, 51:7, 51:13, 52:16, 52:18</p> <p>Quality's - 27:24</p> <p>quasi - 23:11, 23:15</p> <p>quasi-government - 23:15</p> <p>quasi-governmental - 23:11</p> <p>questions - 4:8, 24:10, 29:5, 34:22, 35:3, 40:7, 42:16, 50:5, 60:17, 50:19, 55:1, 58:22</p> <p>questions/ comments - 41:9</p> <p>quick - 20:14, 43:25</p> <p>quits - 20:24</p> <p>quo - 53:9, 53:14</p> <p>quoted - 30:7</p> <p>quoting - 40:10</p>	<p>R</p> <p>R307-103-10 - 18:20</p> <p>raise - 12:5, 56:24, 58:17</p> <p>raised - 11:23, 28:5, 28:8, 28:9, 39:9, 45:2, 48:24, 50:17, 58:14, 58:18</p> <p>raises - 40:5, 50:19</p> <p>ran - 13:13</p> <p>rapidly - 22:1</p> <p>rates - 21:4, 21:6, 21:7</p> <p>Rathbun - 24:15</p> <p>Rather - 10:5</p> <p>rather - 58:4</p> <p>rationale - 64:20</p> <p>re - 40:24, 59:23</p> <p>Re - 1:3</p> <p>re-look - 59:23</p> <p>reach - 45:19</p> <p>read - 30:8</p> <p>ready - 68:14</p> <p>real - 21:8, 34:10</p> <p>realize - 6:3, 34:23</p> <p>realized - 6:1</p> <p>really - 13:9, 14:5, 18:6, 19:18, 21:16, 22:4, 24:19, 34:14, 38:20, 41:3, 44:8, 44:10, 51:8, 56:7, 58:17, 59:4, 60:20, 61:21, 62:20, 66:2</p> <p>reason - 5:17, 6:7, 7:3, 19:2, 19:15, 53:4</p> <p>reasons - 40:14</p> <p>rebuttal - 4:20, 5:5, 29:4, 42:20</p> <p>receive - 18:10</p> <p>recently - 6:16</p> <p>record - 13:7, 30:3, 43:19, 43:22, 47:13, 68:3, 68:9, 68:12, 68:18</p> <p>recuse - 2:6</p> <p>recused - 67:4</p> <p>redoing - 12:12</p>	<p>redone - 10:2</p> <p>redress - 19:24</p> <p>reduce - 49:17</p> <p>referenced - 6:16</p> <p>reflect - 44:16, 63:20</p> <p>reflects - 41:4</p> <p>refused - 6:13, 8:14</p> <p>regard - 38:18, 38:19, 51:3, 53:17</p> <p>regardless - 44:2</p> <p>Regional - 49:8</p> <p>Registrar - 6:16</p> <p>Registered - 69:5</p> <p>regulate - 55:17</p> <p>regulations - 7:8, 7:19, 55:18, 57:23</p> <p>regulatory - 14:19, 16:7, 27:25, 56:8</p> <p>rehashing - 10:4</p> <p>related - 27:8</p> <p>relative - 21:17, 35:10, 40:24, 53:1, 63:22</p> <p>relevant - 5:14</p> <p>rely - 4:25</p> <p>Rely - 6:2</p> <p>remaining - 45:25</p> <p>remedies - 6:25, 40:21</p> <p>remedy - 19:17, 30:8, 30:12, 61:11</p> <p>remember - 6:22, 13:17, 37:15</p> <p>remind - 2:9</p> <p>remote - 63:5</p> <p>remove - 33:23</p> <p>renewable - 15:8</p> <p>repeat - 18:18</p> <p>repeated - 4:16</p> <p>reported - 69:7</p> <p>Reported - 1:12</p> <p>reporter - 4:12</p> <p>Reporter - 4:17, 41:13, 58:21, 69:8</p> <p>represent - 18:12, 24:16, 39:16, 54:5, 57:24</p> <p>representing - 4:16, 12:17, 23:9, 65:22</p> <p>represents - 58:1</p> <p>request - 10:16, 14:8, 25:9, 28:3, 28:17, 38:1, 38:16, 58:11, 68:17, 68:5, 68:18</p> <p>requested - 35:9</p> <p>requesting - 14:20</p> <p>require - 7:8, 12:22, 13:18, 20:25, 47:14</p> <p>required - 2:20, 31:16, 40:20, 43:12, 51:15, 51:21, 52:12, 56:25</p> <p>requirement - 40:15, 68:22</p> <p>requirements - 8:8, 16:9, 24:23, 24:24, 47:20, 53:5, 53:13, 55:18, 55:24, 62:14, 62:18, 63:14</p> <p>requires - 6:9, 25:8, 40:9, 40:11, 51:4, 64:24</p> <p>reserve - 4:20</p> <p>resolution - 27:14, 45:20</p> <p>resolve - 28:3, 45:25</p> <p>resolved - 16:5,</p>	<p>43:13</p> <p>resolving - 33:8</p> <p>resources - 49:13, 64:3</p> <p>respect - 2:25, 23:2, 25:2, 35:7, 47:13, 52:25, 60:4</p> <p>respond - 61:2</p> <p>responsibility - 13:1, 14:25, 50:13, 61:1</p> <p>responsible - 18:13</p> <p>rest - 45:1</p> <p>result - 36:9, 44:24, 46:11, 52:19, 58:17</p> <p>retaken - 10:2</p> <p>retrofit - 49:14</p> <p>reused - 10:1</p> <p>review - 3:11, 3:20, 7:9, 7:13, 7:18, 7:21, 8:3, 8:11, 8:13, 13:8, 13:9, 13:18, 13:20, 29:8, 29:10, 29:19, 30:13, 32:16, 32:18, 32:20, 32:23, 32:24, 33:8, 40:11, 41:20, 42:14, 43:3, 43:14, 43:18, 50:1, 54:4, 56:18, 57:1, 62:11, 62:12, 62:25</p> <p>reviewed - 3:9, 13:4, 56:13</p> <p>reviewing - 45:1, 56:7, 56:9, 58:10</p> <p>Richard - 24:15</p> <p>rigid - 55:19</p> <p>rise - 28:22</p> <p>rising - 28:16</p> <p>road - 18:2, 45:1</p> <p>rounded - 64:21</p> <p>roughly - 28:1</p> <p>Rpr - 1:12, 69:15</p> <p>rule - 5:14, 7:9, 10:25, 18:3, 16:17, 18:18, 18:8, 19:20, 24:23, 25:2, 25:8, 25:7, 25:12, 25:18, 28:16, 30:13</p> <p>Rule - 16:4, 19:21</p> <p>ruled - 65:7</p> <p>Rules - 19:11, 19:12, 19:21</p> <p>rules - 2:19, 5:15, 7:5, 7:22, 12:22, 12:23, 14:3, 27:22, 28:13, 56:4, 57:23</p> <p>ruling - 15:20</p> <p>run - 14:23</p>	<p>S</p> <p>sale - 17:22</p> <p>Salt - 1:9, 69:3</p> <p>Samuelson - 62:3, 57:17, 59:1</p> <p>sat - 51:14</p> <p>satisfied - 24:24, 25:8, 25:14, 25:16</p> <p>satisfy - 6:5, 25:8, 66:7</p> <p>schedule - 8:22</p> <p>scheduled - 17:23</p> <p>scheduling - 11:15, 30:23</p> <p>scheme - 56:8</p> <p>scope - 7:14</p> <p>Seal - 69:13</p> <p>seat - 62:9</p> <p>second - 3:14, 6:7, 40:17, 66:11, 66:13</p>	<p>secondly - 31:14</p> <p>Secondly - 27:6</p> <p>Secretary - 2:11, 3:23, 4:7, 17:11, 24:17, 25:5, 25:19, 25:5, 27:8, 27:9, 27:23, 28:5, 28:9, 35:18, 42:23, 45:3, 47:9, 48:2, 56:5, 56:12, 56:17, 56:19, 62:6, 62:14, 64:2</p> <p>see - 43:16, 62:13, 62:17</p> <p>seek - 19:17, 19:23, 27:14, 31:15, 42:13</p> <p>seeking - 18:21, 19:1, 33:8</p> <p>seem - 28:23</p> <p>Seghina - 41:11, 41:16, 41:23, 42:2, 42:15, 46:14, 46:16, 47:21, 48:8, 48:10, 48:13, 55:14, 57:2</p> <p>Seghina's - 57:18</p> <p>send - 67:16</p> <p>senses - 10:15</p> <p>sensible - 20:3</p> <p>sent - 38:24</p> <p>serious - 12:6, 28:25</p> <p>seriously - 7:19</p> <p>servants - 9:25</p> <p>served - 10:3, 10:5</p> <p>set - 4:24, 12:23, 23:17, 53:4, 56:10, 59:9</p> <p>sets - 16:4</p> <p>settlement - 27:20, 33:3, 33:5, 33:7, 33:10</p> <p>settlements - 33:13</p> <p>Several - 2:10</p> <p>several - 48:16</p> <p>Savler - 1:4, 2:4, 2:12, 2:18, 2:23, 3:2, 3:16, 3:22, 4:5, 12:17, 17:2, 17:4, 25:19, 25:24, 26:3, 48:25, 48:11, 59:11, 59:12, 63:25, 66:10</p> <p>shareholder - 24:2</p> <p>shareholders - 23:25, 24:2</p> <p>Shoop - 24:9, 24:13, 35:5, 35:13, 43:25, 44:8, 57:3, 61:3</p> <p>short - 3:25, 4:21</p> <p>shou - 33:12</p> <p>show - 15:13, 29:22</p> <p>shows - 41:1</p> <p>shutdown - 36:20</p> <p>side - 23:14, 30:24, 58:14, 63:7, 64:17</p> <p>sides - 64:17</p> <p>Sierr - 48:9</p> <p>Sierra - 2:16, 2:22, 3:4, 3:6, 3:21, 4:5, 4:19, 6:10, 7:1, 8:19, 8:24, 9:1, 9:17, 9:20, 10:8, 10:13, 11:6, 11:14, 11:16, 12:10, 12:12, 14:17, 15:4, 16:13, 16:19, 18:3, 19:16, 20:8, 22:3, 22:10, 25:20, 26:8, 26:11, 26:17, 26:18, 27:1, 27:7, 27:10, 27:17, 28:7, 28:21, 29:15, 30:20, 31:21, 32:10, 33:4, 33:14,</p>
--	--	--	---	--	---	--

33:21, 33:22, 34:11, 34:14, 34:25, 38:24, 39:23, 41:16, 48:10, 46:18, 48:9, 48:10, 48:25, 52:5, 58:20, 59:14, 60:7, 60:17, 61:18, 63:13, 63:23, 64:10, 64:17, 64:19, 68:5, 68:9 signed - 49:4, 67:12, 67:16 significant - 15:3, 26:22 significantly - 6:20 Sigurd - 2:14 simple - 58:15, 67:14 simply - 45:15, 61:23 Sip - 7:22, 8:10, 8:14 Slips - 7:10 alt - 28:11 sitting - 15:2 situation - 25:4, 40:5, 40:12 situations - 6:23 skirmishing - 62:12, 62:23 slam - 15:23 small - 31:25, 44:15 society - 58:23, 55:25 someones - 49:7 somewhat - 65:13 somewhere - 31:9 Soon - 67:21 soon - 28:23, 27:3, 67:12, 67:18, 67:22 sorry - 7:10, 8:13, 8:14, 11:20, 41:13, 56:21 Sorry - 41:8 sort - 30:4, 30:23, 33:17 sorts - 8:21, 8:22, 64:13 sounds - 58:23 source - 7:16 sources - 28:2, 49:10, 56:21 Spc - 11:22, 38:19 Speaker - 66:20, 66:24, 67:2, 67:8 speaking - 43:9 specific - 38:18, 58:25 specifically - 38:18, 52:11 specifics - 56:10 specified - 51:16 spend - 20:12, 49:19 split - 56:2, 56:4 squarely - 34:3 ss - 69:3 Se - 45:20 staff - 49:24, 50:1 stage - 25:25 standard - 13:15, 15:12, 18:17, 19:5, 19:9, 26:14, 29:8, 29:10, 29:18, 29:20, 40:13, 40:17, 47:14, 53:4, 81:24 standards - 7:4, 7:5, 19:8, 47:24, 52:14, 57:23, 63:17, 63:18 standing - 2:21, 5:20, 5:25, 6:4, 8:8, 10:13, 11:2, 12:21, 12:23, 12:24, 12:25, 13:18, 13:19, 13:23, 14:8, 14:22, 15:18, 19:3, 19:5, 22:24, 26:13, 27:4, 28:13, 28:19, 29:13, 30:17, 33:20, 34:19, 37:10, 40:14, 40:23, 40:24, 41:17, 41:21, 42:3, 42:11, 43:7, 45:23, 48:18, 48:21, 48:23, 48:25, 47:19, 48:25, 50:5, 50:19, 51:17, 56:24, 63:19, 63:21, 65:18 standpoint - 35:25, 50:16, 52:19 start - 9:21, 12:17, 17:25, 34:9, 35:19, 36:19, 62:5, 62:10, 64:14, 64:18, 65:9, 65:12 started - 36:11 starting - 30:2 startup - 38:19 startup/shutdown - 48:1 startup/shutdown/ maintenance - 45:21 State - 5:12, 6:18, 23:3, 23:17, 23:23, 32:5, 69:2, 69:6 state - 7:2, 7:9, 7:21, 8:3, 8:12, 14:18, 16:13, 39:14, 61:2 statement - 6:15, 6:23, 8:1, 39:21, 49:4, 65:13 States - 6:17, 8:7 states - 6:17 stationary - 49:10, 55:21 status - 2:10, 11:12, 11:13, 11:14, 11:25, 12:1, 25:21, 33:9, 33:18, 35:8, 47:4, 47:10, 47:17, 48:4, 53:9, 53:14 statute - 7:18, 30:10 stay - 3:5, 3:10, 3:14, 3:15, 4:3, 5:18, 6:4, 10:13, 10:16, 11:3, 12:13, 14:8, 16:2, 16:20, 16:24, 18:21, 19:1, 19:2, 19:15, 19:17, 19:23, 21:17, 22:13, 24:25, 25:3, 25:9, 25:10, 25:14, 25:18, 26:16, 26:24, 27:5, 27:12, 27:16, 27:18, 28:24, 29:1, 30:5, 30:11, 30:25, 31:5, 31:8, 31:7, 31:21, 34:1, 34:8, 35:9, 35:10, 35:21, 35:23, 35:25, 37:9, 37:23, 37:24, 38:5, 39:3, 39:22, 40:8, 44:20, 44:24, 45:8, 45:21, 48:1, 46:2, 52:25, 53:7, 53:11, 53:15, 57:6, 57:8, 58:17, 58:20, 59:7, 60:13, 60:14, 61:5, 61:8, 61:16, 62:24, 63:5, 63:17, 63:24, 64:1, 66:5, 66:9, 66:17	Stay - 1:4, 2:4, 14:5 stayed - 5:10, 44:9 staying - 10:18, 13:23, 52:17, 53:2 stays - 31:16 Stead - 35:4 stanotype - 69:7 step - 53:13 Stephens - 24:14, 24:15, 63:2, 63:3 still - 15:3, 34:22, 44:22 stop - 13:20, 14:21, 16:13, 45:22, 46:2 stops - 16:20, 44:25 straight - 28:18, 37:23, 40:19 strange - 28:23 strong - 10:9 strongly - 22:22 struck - 57:18, 58:13 stuck - 64:4 subdivision - 23:22 subject - 12:7, 43:3, 48:23 submit - 14:9, 14:14, 15:20, 16:24, 19:15, 23:8, 45:11, 62:1 submits - 28:9 submitted - 15:21, 16:25, 17:10, 26:1, 26:7, 32:10, 45:7, 62:5 submitting - 62:23 substantial - 15:13, 49:13 successful - 9:20, 12:13, 38:9 sudden - 28:25 suffer - 19:1, 30:21, 33:5 sufficient - 8:11 sug - 33:11 suggest - 5:16, 10:9, 10:11, 13:3, 25:18, 34:1, 40:5, 64:10 suggested - 14:12, 44:14, 64:12 suggestion - 3:17, 3:25, 14:8, 29:8, 29:24, 31:2, 31:23, 32:1, 32:9, 33:3, 33:11, 33:20 suggests - 12:5, 41:8 sum - 12:2 superfluous - 16:5, 16:14 supplement - 68:13 support - 15:20 supported - 13:11 supposed - 12:24, 32:19, 32:24, 49:26, 51:16 Supreme - 6:17, 23:4 system - 14:4, 14:13, 16:2, 16:19, 16:22 systems - 44:3	temporary - 30:12 tendency - 58:13 tens - 20:22, 21:18, 22:17, 58:18 term - 20:25, 46:13 termi - 37:9 terms - 18:17, 20:5, 21:16, 25:6, 35:8, 41:12, 41:15, 41:24, 42:24, 45:19, 55:14, 61:3, 61:13 test - 5:14, 5:17, 14:1, 14:10, 28:19, 28:24, 30:20, 31:14, 44:20, 61:15, 61:19 testimony - 9:7, 15:16, 47:7, 59:25 tests - 44:21 thereafter - 69:8 therefore - 8:2, 8:13, 11:2, 11:6, 11:25, 34:5, 66:8 Therefore - 29:20, 32:6 thereof - 69:12 they've - 66:7 They've - 17:6, 19:10, 19:16, 61:7 thick - 62:3 third - 10:20, 15:26, 23:14 Third - 8:19 threat - 27:7 three - 5:26, 53:24 threshold - 8:8, 63:14 throughout - 5:23 today - 3:12, 30:19, 45:8, 63:9, 65:14 Today - 66:1 today's - 42:23, 68:3 together - 17:7 token - 33:25 tolerate - 58:2 tomorrow - 34:9, 35:20 tons - 20:23 tough - 13:15 towards - 33:7 transcribed - 69:6, 69:9 Transcript - 1:7 transcript - 68:2, 68:9, 68:17 transcription - 69:9 trial - 9:5, 9:6, 9:8, 11:21 trouble - 4:14 true - 28:7, 30:5, 32:2, 32:4, 44:16, 69:8 Trust - 4:19, 29:16, 39:16 try - 45:24 trying - 8:1, 14:24, 33:23, 34:21, 40:16, 40:22, 46:19, 54:5 turn - 12:19 turning - 33:21 turns - 42:10 Two - 63:15 two - 3:13, 5:10, 6:22, 20:9, 20:19, 23:13, 28:20, 29:1, 37:3, 38:11, 38:16, 40:14, 41:4, 47:25, 48:16, 49:1, 50:18, 53:24, 59:6, 59:20, 60:20, 61:16, 64:8	two-page - 37:3 type - 38:7 types - 9:1 typewriting - 69:8 typically - 31:14, 31:16 Typically - 31:24
U			
Uh-oh - 60:23 ultimately - 8:5, 11:19, 32:16, 36:9 unable - 7:20 unanimous - 54:22, 64:24 uncomfortable - 49:2 under - 5:17, 7:6, 7:10, 8:6, 30:20, 35:20, 40:18 undermining - 10:25, 11:3 underscores - 33:4, 33:14 undertake - 8:22 unfairly - 10:19 unhealthy - 58:9 uniform - 5:22 Unit - 2:12 unit - 23:14 United - 6:17, 8:7 units - 23:13 Unknown - 66:20, 66:24, 67:2, 67:5 Unless - 30:10 unless - 19:2, 53:11 unscramble - 9:16 unsuccessful - 22:21 up - 4:11, 4:25, 10:2, 12:2, 14:23, 16:5, 16:12, 16:18, 18:9, 20:18, 21:1, 23:17, 28:14, 40:4, 41:14, 42:9, 42:25, 43:12, 48:21, 53:6, 58:22, 58:24, 59:2, 68:20, 67:16, 68:5 Up - 32:21 upgrading - 49:15 upset - 36:20 upwards - 21:8 urge - 16:23, 44:15 uses - 17:16 Utah - 1:1, 1:9, 5:20, 6:22, 7:6, 8:16, 12:25, 13:14, 17:16, 17:19, 23:3, 23:4, 23:12, 23:18, 23:23, 40:12, 41:5, 44:3, 69:2, 69:6, 69:13 Utah's - 32:5, 32:7			
V			
vacuum - 51:6, 53:21 valid - 30:1, 43:1, 43:2, 43:5, 45:4 validity - 36:2 value - 60:3 various - 24:23, 65:21 vehicles - 49:10 Veranth - 58:14, 67:16 veto - 27:20 view - 23:2 viewpoints - 28:4			
T			
table - 62:9, 64:25 technical - 18:4 technology - 17:17, 48:22, 49:14, 58:2			

Kelly L. Wilburn, CSR, RPR

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violation - 28:3 Virginia - 8:10 Virginia's - 8:9, 8:13, 8:14 visibility - 38:20 voice - 54:22, 55:8, 55:10 vote - 48:24, 49:3, 50:3, 55:4, 66:14, 66:19, 67:2, 67:3 voting - 66:23, 67:1	years - 20:9, 20:18, 20:19, 21:5, 21:7, 46:19
W	
wait - 9:12, 48:3, 60:5, 60:15, 65:7 waiting - 10:8, 38:3 Walker - 4:10, 4:18, 5:4, 5:8, 22:25, 24:21, 29:7, 35:19, 37:11, 37:14, 37:20, 38:2, 38:10, 38:12, 39:1, 39:5, 39:12, 39:18, 39:20, 40:1, 41:19, 42:1, 42:4, 63:2, 64:8, 64:7, 67:10, 67:19, 67:22, 68:1, 68:7, 68:14, 68:16, 68:23 wants - 9:11, 27:23, 57:13 warrant - 29:1 water - 17:9, 66:15 week - 67:23 weigh - 63:20 weighed - 66:19, 65:23 weighting - 20:5, 21:16, 61:16, 66:2, 66:4 welcome - 50:4 well-rounded - 64:21 Wessman - 2:5, 67:3, 67:4 west - 22:1 West - 1:8, 49:11 Western - 49:7 whatnot - 40:4 white - 58:5 whole - 10:16, 10:22, 31:17, 32:4, 32:15, 40:4 wholly - 22:4 wide - 30:14 Wilburn - 1:12, 69:5, 69:15 win - 15:14 wise - 64:2 Witness - 62:1, 69:13 witnesses - 9:6, 47:7, 59:24 won - 16:6 word - 4:21 words - 9:14, 10:25, 64:21, 65:1 works - 63:7, 63:8 world - 57:21 worth - 15:2, 25:9, 26:10 wrap - 28:14 Wrap - 49:12, 49:20 written - 5:14 wrote - 34:20	
Y	
year - 20:9, 20:20, 20:23, 64:4 years - 15:2	

BEFORE THE UTAH AIR QUALITY BOARD

RE:

MOTIONS TO STAY IN IPP
AND SEVIER POWER APPEALS.)

COPY

TRANSCRIPT OF HEARING PROCEEDINGS

TAKEN AT: 168 North 1950 West
Salt Lake City, Utah

DATE: June 1, 2005

TIME: 1:41 p.m.

REPORTED BY: Kelly L. Wilburn, CSR, RPR



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1 JUNE 1, 2005

1:41 P.M.

2 P R O C E E D I N G S

3 THE CHAIR: We are now to Item 4. Motion to
4 Stay in the IPP and Sevier Power appeals. Fred Nelson.

5 MR. WESSMAN: Mr. Chairman, because of my
6 involvement with PacifiCorp, I'll have to recuse myself
7 from the discussion.

8 THE CHAIR: Thank you.

9 MR. NELSON: The -- just to remind the Board
10 the status of this matter. Several months ago, in the
11 fall of 2004, the Executive Secretary issued a permit to
12 IPP to build Unit No. 3. And also a permit to Sevier
13 Power Company to build a coal-fired generation power
14 plant down by Sigurd.

15 Those permits were appealed to the Board by
16 the Sierra Club and by a citizens' group. Sierra Club
17 appealing both permits, and the citizens' group
18 appealing just the Sevier Power Company permit.

19 Part of the rules of the Board is that the
20 Board is required to grant intervention and establish
21 standing for parties in order to proceed. And the Board
22 heard the motions to intervene -- of the Sierra Club to
23 intervene in both the Sevier Power Company proceeding
24 and the IPP proceeding, and the Board denied those
25 motions. And orders were issued with respect to those.

1 The Board also granted the -- approved and
2 granted the petition to intervene in the Sevier
3 Citizens' Group. At the time that the orders were being
4 considered by the Board, the Sierra Club filed motions
5 to stay. Motions to stay the proceedings until they
6 have appealed the decision on the petitions to intervene
7 to the appellate court.

8 The Sierra Club has filed those petitions to
9 have those decisions of the Board reviewed. And is now
10 before the Board to ask that they -- the Board stay
11 proceedings until that review has happened. So that,
12 that is the issue today.

13 There, there are two motions. The motion
14 stay the proceedings in the IPP matter. And the second
15 motion is the motion to stay the proceedings in the
16 Sevier Power Company matter.

17 My suggestion to the Board is that we handle
18 this consistent with the way we did the motions to
19 intervene. That you've had the pleadings, and you've
20 had a chance to review those pleadings. There are four
21 interested groups in this matter: There's the Sierra
22 Club, IPP, Sevier Power Company, and the Executive
23 Secretary.

24 Those are the four that filed pleadings.
25 And my suggestion is is that you hear a short oral

1 description of the important points that they feel is
2 appropriate, and then you proceed to make a decision on
3 those motions to stay.

4 As far as an order, it would be appropriate
5 to have the Sierra Club go first, followed by Sevier
6 Power Company, and IPP, and then finally with the
7 Executive Secretary. And then if there are any
8 questions of the Board or comments, you can deal with
9 those at that point.

10 THE CHAIR: All right. Ms. Walker, would
11 you like to come up?

12 And for the benefit of the court reporter,
13 we all need to be -- attempt to speak clearly and
14 distinctly. And if you are having trouble hearing or if
15 the microphones aren't working, please just flag and
16 I'll ask to have it repeated.

17 THE COURT REPORTER: Thank you.

18 MS. WALKER: I'm Joro Walker, representing
19 the Sierra Club and the Grand Canyon Trust. Fred, how
20 long do I have, and can I reserve time for rebuttal?

21 MR. NELSON: Well, I used the word "short"
22 hoping we -- we did 10 minutes before, when we had
23 extensive pleadings. I don't know. The Board probably
24 needs to set -- if you want to set a time, you can. Or
25 you can just rely on counsel to be appropriate. It's up

1 to the Board.

2 THE CHAIR: Rely on people to be
3 appropriate?

4 MS. WALKER: Okay, appropriate. Do I have
5 time for rebuttal, though?

6 MR. NELSON: That would be, that would be
7 what would be normally an appropriate process.

8 MS. WALKER: Okay. Okay, thank you. To be
9 clear, and I think Fred explained this well, is that
10 we're asking for the two proceedings to be stayed while
11 our appeal -- or our petition is heard by the Court of
12 Appeals. The State Court of Appeals.

13 As you are aware, there's a, a four-part
14 test that are written into the rule -- the relevant
15 rules that's been given to you by every party. So I'm
16 going to explain the factors that I think suggest that
17 there's a compelling reason, under that four-part test,
18 that you stay those proceedings.

19 And the first one is that it's the job of
20 the Utah courts to determine standing. As, as the
21 appellate court has said, it has the duty and power to
22 say what the law is, and to ensure that it's uniform
23 throughout the jurisdiction.

24 And you have probably never heard of
25 "standing" before three or four months ago. And, as y

1 realized when you were trying to apply it, it's not all
2 that easy a concept to apply. And therefore the most
3 prudent thing may well be to realize that the courts
4 have the expertise to determine standing. And to stay
5 this proceeding, and give them a chance to figure out
6 what's going on.

7 The second reason, and another reason why
8 this issue should be given to the courts to grapple
9 with, is because the Clean Air Act requires access for
10 groups like the Sierra Club to judicial and
11 administrative proceedings. As the EPA has said:

12 "All affected members of the public must
13 be allowed to challenge PSD determinations."

14 And as you recall, this proceeding is about
15 a PSD permit. The statement made by the EPA in the
16 *Federal Register*, which was recently referenced by the
17 United States Supreme Court, in a dissent states that:
18 State implementation plans, including those parts
19 dealing with PSD permits, must provide that all affected
20 members of the public be allowed to challenge those
21 permits.

22 And in Utah, remember, there's two
23 situations that mean that that, that statement applies
24 to this Board. The first is that all parties -- all
25 entities must exhaust their administrative remedies. So

1 if you deny Sierra Club access to this proceeding, you
2 are essentially denying them access to the state courts.

3 And the other reason is is that the
4 standards are the same. As you recall, in your own
5 rules it says that the standards are those established
6 under Utah law by the Utah courts.

7 And this is what EPA said: The EPA
8 interprets the existing law and regulations to require
9 an opportunity for state judicial review -- review, I'm
10 sorry, of a PSD permit action under approved PSD SIPs by
11 permit applicants and affected members of the public in
12 order to ensure an adequate and meaningful opportunity
13 for public review and comment on all issues within the
14 scope of the permitting decision, including
15 environmental justice concerns and alternatives to the
16 proposed source.

17 The EPA believes that an opportunity for
18 public review and comment, as provided in the statute
19 and regulations, is seriously compromised where an
20 affected member of the public is unable to obtain,
21 obtain judicial review of an alleged failure of a state
22 to abide by its PSD SIP permitting rules. Accordingly,
23 all such persons, as well as the applicant, must be able
24 to challenge a PSD permitting action in a judicial
25 forum.

1 And later in the same statement the, the EPA
2 goes on to say it believes that Congress intended such
3 an opportunity for state judicial review of PSD permit
4 actions to be available to permit applicants, and at
5 least those members of the public who can satisfy
6 threshold standing requirements under Article 3 of the
7 Constitution. And that means the United States
8 constitution.

9 And based on EPA's analysis of Virginia's
10 proposed SIP, it determined that Virginia did not allow
11 sufficient judicial -- public review processes, public
12 access to the judicial courts -- to the state courts,
13 I'm sorry. And therefore refused to review Virginia's
14 SIP -- I'm sorry, refused to approve Virginia's SIP.

15 So the conclusion from this is that, again,
16 the expertise of the Utah courts is necessary because
17 more than just the permits before this Board is at issue
18 here.

19 Third, the Sierra Club will be harmed
20 significantly if this proceeding goes forward without
21 it. The Board will make decisions. All sorts of
22 decisions. And the parties will undertake all sorts of
23 activities as this proceeding goes forward. And the
24 Sierra Club won't be a part of them.

25 The longer this goes on, the more prejudiced

1 the Sierra Club is gonna be. These types of decisions
2 and activities include discovery, motion practices,
3 motions, advocacy on any of the issues that might arise
4 in the course of pretrial preparation of the case. And,
5 ultimately, the trial preparation itself. Including
6 direct and cross examination of witnesses at trial, and
7 the opportunity to present testimony and evidence at
8 trial at their own initiative.

9 And these decisions matter. As everyone
10 knows, getting in at the ground level is critical if you
11 are going to influence decision makers. No one wants to
12 wait until the last minute to give their take on a
13 particular issue.

14 In other words, once the proceeding goes on,
15 and the longer it goes on, the more difficult it will be
16 to backtrack, and to unscramble the egg, and allow the
17 Sierra Club a fair opportunity to participate in the
18 proceeding.

19 The fourth is the issue of efficiency. If
20 the Sierra Club is successful, the proceeding is gonna
21 have to start over. There's gonna be new discovery.
22 There's gonna be new schedule. There's gonna be -- new
23 depositions will have to be taken. New issues before
24 this Board.

25 And essentially the public servants involv

1 in the decision making, their time will be reused and
2 retaken up as these issues are redone, as well as the
3 time of this Board. The public will not be served by
4 such a rehashing of the issues before this Board.
5 Rather public -- the, the public good will be served by
6 delaying the process until the Sierra Club can
7 participate fully in the proceeding.

8 And fifth, there's no strong arguments to
9 suggest that waiting will harm anyone. It's merely a
10 delay of the process. And none of the arguments put
11 forward by any of the parties suggest otherwise.

12 You've been presented with the argument that
13 Sierra Club doesn't have standing to ask for a stay of
14 the very proceeding that they were denied participation
15 in. Now, this argument makes no sense, because the
16 whole idea behind a request for a stay is that the party
17 that lost has an opportunity to appeal. That the
18 fairness of that appeal is preserved by staying the
19 proceedings, because to do otherwise would unfairly
20 prejudice them. And third, that the decision may be
21 wrong.

22 That's the whole premise, that the decision
23 may be wrong. So if you assume the, the premise that
24 the decision may be wrong is invalid, you are
25 undermining the rule. So in other words if you say,

1 "Well, we're gonna assume that our decision is right,
2 and therefore that you don't have standing to proceed,
3 well, that's undermining the very notion of the stay to
4 begin with.

5 There's this issue of whether an amicus is
6 good enough. And therefore, somehow, the Sierra Club
7 won't be harmed, because it's allowed to participate as
8 an amicus but not as a full party. And as, as I already
9 pointed out, all the activities and the decisions that
10 the Board will be making as this procedure -- as this
11 process goes forward, that, in that context, full-party
12 status is very different than amicus status.

13 For example, without status -- this
14 full-party status, as you've already seen, the Sierra
15 Club has been excluded from scheduling matters. Already
16 that decision has been made by this Board. We -- Sierra
17 Club can't make motions. We can't participate in
18 discovery. We can't advocate on the issues that arise
19 in pretrial preparation. And ultimately, we can't
20 participate in public -- I mean, I'm sorry, in the
21 trial. In preparation for the trial.

22 In addition, particularly in the SPC matter,
23 we raised a lot of issues that were not raised by the
24 citizens' group. Those issues won't be addressed at
25 all. And, therefore, amicus status won't be anything

1 like full-party status.

2 So just to sum up, I think that the, the
3 fact that the courts are in a better position -- are in
4 the best position to address this matter. That this
5 matter does raise, as the fourth factor suggests,
6 presents serious issues on the merits. That should be
7 the subject of further adjudication by the courts, who
8 are in the best position to do so.

9 And based on that, and based on the harm
10 that will occur to the Sierra Club, and the lack of harm
11 that will occur to anyone else, and the public interest
12 in not redoing this proceeding should the Sierra Club be
13 successful in their appeal, favors a stay in both
14 proceedings. Thank you.

15 THE CHAIR: Mr. Finlinson?

16 MR. FINLINSON: I'm Mr. Finlinson,
17 representing the Sevier Power Company. Just to start
18 out initially, the -- Counsel has just encouraged you
19 not to -- basically, to turn over your decision-making
20 process to the court. Apparently you don't have the
21 ability to make those standing decisions.

22 And yet your rules require you to deal with
23 the issue of standing. Your rules set forth that, that
24 that standing is supposed to be governed by the, the
25 Utah case law dealing with standing. And you have that

1 responsibility to make that decision. If you go ahead
2 and approve it, then I just think that she might finally
3 suggest that you don't have the authority to approve; we
4 ought to have that reviewed by the court as well.

5 I think you have that obligation to make
6 that decision. And the review at the circuit court by
7 the Court of Appeals is one on the record that you've
8 looked at. They don't bring in new evidence. And the
9 court has to conduct a review, really, to determine
10 whether or not your decision was arbitrary or
11 capricious. Or that it wasn't supported by any of the
12 evidence upon which was presented to you. And you
13 basically ran away with a decision and didn't pay
14 attention to the Utah law.

15 That's a pretty tough standard for the
16 appellates to, to meet. And so I think you need to
17 remember that and keep that in perspective. We think
18 that if a party lacks standing to, to require the review
19 of a permit, they probably don't have enough standing to
20 ask you to stop the review of that process.

21 That's basically what's happened in this
22 case. I'm not sure that you can be a party without
23 standing. The issues of staying are pretty much a very
24 guarded option that's available during an appellate
25 process. It's not granted very easily. There's a very

1 difficult four-part test. You have to meet every one of
2 the four parts in order to be justified, based on your
3 own rules, which are consistent with the rules of our
4 judicial system.

5 Stay is not really a very favored option.
6 They're not granted lightly by the courts, and shouldn't
7 be granted lightly by this Board. Even if they had the
8 standing to make the suggestion to request the stay, we
9 submit to you that they failed to meet the four-part
10 test.

11 They talked about irreparable harm. But
12 what is the harm that's gonna be suggested in a hard --
13 part of the system. And your actions are done in
14 public. And they have that issue. And we submit that
15 they fail to meet them. They talk that -- they have to
16 convince you, or the court, that the injury to the
17 Sierra Club is gonna be far more irreparable than the
18 injury to the project. Or to the state in its
19 regulatory process.

20 They're basically requesting that this body,
21 the Board of Air Quality, stop whatever you are doing
22 until the court makes a decision on standing. That
23 could run anywhere up to 18 months. And so your work on
24 what you are trying to accomplish as your administrative
25 responsibility has to come to a halt.

1 The carrying cost of a \$500 million proje
2 a capital project, for a year's worth of just sitting
3 still is pretty significant. And I think that that far
4 outweighs the harm that would be cost to the Sierra
5 Club.

6 The question of whether or not it's adverse
7 to the public interest. If the public's interest is
8 having an abundance of renewable or energy that is
9 available that is driven by a legitimate process, that
10 public interest will be adverse to the decision of, of,
11 of holding that.

12 And the fourth standard is to look at
13 -- they have to show that they have a substantial
14 likelihood that they'll win. And you have looked at the
15 case law, you've heard the testimony, and you've made a
16 decision that they don't have standing.

17 That decision will go to the, to the Circuit
18 Court of Appeals. They'll have to decide whether or not
19 you erred in making that decision. That the evidence
20 that you heard doesn't support your ruling. I submit to
21 you that the evidence was submitted, and will justify
22 that your decision was an appropriate decision. I don't
23 think that there's a slam dunker that they're likely to
24 prevail in that part.

25 And then there's a third item that I wanted

1 you to look at. And this is that in the judicial
2 system, when you go and ask for a stay while you take a
3 matter upon appeal, they have a rule in civil
4 procedures, Rule 62. And it's a process that sets a, a
5 filing that they have to put up, a bond, a supercilious
6 bond, to protect the person who won on the, you know,
7 who's being appealed. That judgment is being appealed.

8 And that appeal -- or the cost of that bond
9 for a \$500 million project, or probably an even greater
10 amount for the Intermountain Power Project because their
11 client was gonna be bigger than ours, that cost is
12 pretty expensive to put up that kind of a bond. If the
13 Sierra Club can convince you to stop your state process,
14 that prevents us from the protection of the supercilious
15 bond.

16 And the -- and so by, by granting -- because
17 you don't have a rule in, in your process that allows
18 you to put up a bond in case they don't prevail. The
19 court system does. So if the Sierra Club can convince
20 you to do that, they get a stay that stops you, without
21 the benefit of a bond to protect the other parties like
22 they would in the court system.

23 So I -- we would urge you that, one, that
24 their petition for you to stay should be denied, based
25 on those issues that we've submitted.

1 MR. BURWELL: Mr. Finlinson, I, I'm new t
2 the Board. Can you describe briefly who Sevier Power
3 Company is?

4 MR. FINLINSON: Sevier Power Company is a
5 holding company owned by another company by the name of
6 NEVCO. They're -- they -- their offices are in
7 Bountiful. They're the ones that have put together the
8 project. They've acquired the options for the land, the
9 options for the water. And developed and done the air
10 monitoring. And submitted the application for the
11 approval, which was granted by the, the Secretary.

12 MR. BURWELL: And how big of a project is
13 it?

14 MR. FINLINSON: It would be about a
15 \$500 million project. It's a 270 megawatts net
16 generating facility. It uses coal, but it uses a
17 circulating fluidized bed technology instead of the
18 pulverized coal process that the power plants for Utah
19 Power & Light, over the mountain in Huntington, Utah.

20 So it's, it's a pretty clean process. It's
21 a 270 megawatt net production. We probably have about
22 250 megawatts that would be available for sale.

23 MR. BURWELL: And when are you scheduled to
24 begin construction?

25 MR. FINLINSON: We're not gonna start until

1 we have a permit. So we -- you don't, you don't get
2 down that road until you have a permit. In fact, the
3 permit is the approval to construct, I think is the
4 technical name of the permit.

5 So until this issue is resolved, that
6 project is really kind of on a hold. As would any other
7 project. Because in your regulatory capacity you have
8 that assignment to make sure that, whoever the applicant
9 is, that they line up with the requirements of the Clean
10 Air Act to be entitled to receive a permit. Thank you.

11 MR. HALEY: Good afternoon. I'm George
12 Haley, I represent IPA. And I have with me Lance Lee,
13 who is the individual at IPA who's responsible for coal
14 procurement. And I'd like to have him just use part of
15 my time. I'll be brief.

16 I agree with what Mr. Finlinson said in
17 terms of laying out the standard. I just have a couple
18 of additional comments, and I won't repeat what he has
19 said. But the rule that's at, at play here and controls
20 your decision is R307-103-10. And it places, on the
21 party who is seeking the stay, the burden of
22 establishing all four of those elements that you already
23 heard us talk about.

24 And I would submit, you don't have to go
25 beyond the first one. And the first one is that the

1 party seeking the stay will suffer irreparable harm
2 unless the stay is issued. And, of course, the reason
3 behind the denial of their standing is the Sierra Club's
4 failure to prove any palpable injury to a point of
5 establishing standing. Which is a lower standard than
6 irreparable harm would be.

7 The other point I want to make is these four
8 standards that are articulated in that rule are
9 essentially the preliminary injunction standard that you
10 have in court. They've kind of taken it from a long
11 body of case law in the Rules of Procedure and plugged
12 it into the Administrative Rules.

13 The one thing that's not there is this
14 bonding issue that Mr. Finlinson mentioned. And I would
15 submit that that is a good reason why the motion to stay
16 should be denied. If it's denied, the Sierra Club has
17 the clear remedy to seek a stay in the Court of Appeals.
18 They've already filed their appeal. So really the --
19 already the Court of Appeals has jurisdiction.

20 And there's a rule precisely on point, which
21 is Rule 17 of the Rules of Appellate Procedure, that
22 says if an application in front of a board like this is
23 denied, and the motion for stay is denied, they can seek
24 redress in the Court of Appeals. And the Court of
25 Appeals can consider whether or not a bond should be

1 issued.

2 Which, I think, is the fairest way and the
3 most sensible way to proceed. Because the other element
4 that they will not be able to establish is that, in
5 terms of weighing the damages, that the damage is so
6 much higher for IPA than it would be the Sierra Club.

7 And I'm gonna have Mr. Lee just briefly tell
8 you some of the analysis he has made on what the cost of
9 delaying this for some year and-a-half, two years, who
10 knows? Once, once an appeal is taken, it's an
11 indefinite period of time.

12 MR. LEE: Mr. Haley asked me to spend a
13 brief moment here and discuss -- go briefly with you an
14 analysis -- quick analysis that I did on potential harm
15 that could be -- come to the project if a delay is
16 incurred.

17 As you are well aware, our price of energy
18 has went up over the last few years. In particular coal
19 has increased in the price, over the last two years,
20 about 30 percent per year. So by delaying the project
21 it has a huge impact on potential to cost this project
22 tens of millions of dollars. Especially when you are
23 talking on order of 3 million tons a year.

24 The financial community quite possibly could
25 require us to enter into long-term agreements. And if

1 you delay that and the price of coal moves up further
2 as it has in the past, it could literally cost us
3 hundreds of millions of dollars.

4 Interest rates have been low these past few
5 years. Our analysis has taken in account some inflation
6 of those interest rates. But as we have seen in the
7 past couple years, interest rates continue to creep
8 upwards, not downwards. So there is very real harm that
9 can be caused to this project by delaying it.

10 I would go more into cost of the coal,
11 but -- and exact contracts that we have to prove where
12 price of coals went, but we have confidentiality clauses
13 in our agreements that don't allow me to discuss --
14 disclose those.

15 MR. HALEY: Thank you. But I think that
16 really makes the point in terms of weighing what would
17 be the relative harm on a, on a stay that -- it's clear
18 that it could have the impact of at least tens of
19 millions at a minimum, to hundreds of millions of
20 dollars to this project.

21 Which would have a corresponding increase in
22 the price of power that's gonna be generated out of that
23 project, which is not in the public interest to increase
24 the price of power. There's also the need of power, and
25 delaying that over time as you are looking forward.

1 The, the west is growing rapidly, and there's an
2 increasing need to have power generation.

3 So I, I would argue that the Sierra Club has
4 wholly failed to meet its burden of establishing really
5 any of the four points. But they only need to fail to
6 establish one of the four points in order for the denial
7 to be appropriate.

8 And then, again, I would just say that the
9 Board got it right in its order of, of May 12th. That
10 the Sierra Club has appealed it. At this point, I think
11 the appropriate thing to be is let the Court of Appeals
12 deal with this issue.

13 If they think they should have a stay, let
14 them argue it in the Court of Appeals. Let us argue
15 what the appropriate bond would be. Because you
16 shouldn't just be able to come in, and for a piece --
17 price of a piece of paper be able to cost my client tens
18 or hundreds of millions of dollars.

19 They ought to be able -- they ought to be
20 forced to post a bond to cover what our harm would be if
21 their appeal is unsuccessful. Which we, of course,
22 strongly believe that it will be, just as the Board
23 found in its May 12th order that there wasn't a legal
24 basis for standing.

25 And as what the arguments that Ms. Walker

1 made about the EPA's position. The EPA, with all due
2 respect, what their view is is not controlling on this
3 Board, nor the courts of the State of Utah. That's
4 controlled by the Utah Supreme Court. Which was the
5 basis of the decision -- those decisions that we argued.

6 And with that, I'll submit it. I think the
7 motion should be denied. Thank you.

8 MR. BURWELL: Can you, can you describe the
9 company that you are representing and, and what's the
10 background of that company?

11 MR. HALEY: The IPA is a quasi-governmental
12 entity. It's in Millard, Utah. It has -- or Delta,
13 Millard County. It has two existing units. We've
14 petitioned to build a third unit on the same side.

15 MR. BURWELL: What does "quasi-government"
16 mean?

17 MR. HALEY: It was set up by the State of
18 Utah. It has governmental immunity. It's --

19 MR. BURWELL: Well, is, is IPA an acronym?

20 MR. LEE: Intermountain Power Agency.

21 MR. BURWELL: Okay.

22 MR. LEE: It's a political subdivision of
23 the State of Utah.

24 MR. BURWELL: Are there any private
25 shareholders of IPA?

1 MR. LEE: We don't have, I don't think, any
2 shareholder -- shareholders.

3 MR. BURWELL: And how, how many employees do
4 you have?

5 MR. LEE: At the power plant there are
6 approximately 500 employees.

7 MR. BURWELL: Okay, thank you.

8 MR. HALEY: Anything else? Thank you.

9 MS. SHOOP: Mr. Chairman, will we be allowed
10 to ask some other questions once everybody else is
11 finished?

12 THE CHAIR: Yeah.

13 MS. SHOOP: Thank you.

14 MR. STEPHENS: Good afternoon, my name is
15 Christian Stephens. Mr. Richard Rathbun and I are
16 assistant attorneys general, we represent the Executive
17 Secretary. We appreciate the opportunity to address the
18 Board this afternoon.

19 And what we are dealing with here is really
20 comes down to a question of eligibility. The other
21 parties, Ms. Walker, Mr. Finlinson, and Mr. Haley, I
22 believe have done an adequate job of educating the Board
23 on the various requirements of the rule. These are the
24 requirements that must be satisfied in order to be
25 eligible for a stay.

1 So briefly I would just like to point out
2 few of the issues with respect to how this rule
3 governing the, the granting or the denial of a stay
4 applies to this situation from the perspective of the
5 Executive Secretary.

6 By its terms the rule requires, as the other
7 parties have said, that all four elements of the rule
8 must be satisfied. And the failure to satisfy even one
9 is fatal to the request of a stay. But it's also worth
10 pointing out that the granting or denial of a stay is
11 discretionary with the Board.

12 The rule says that the Board may deny -- may
13 deny or may for -- I guess a better way to say it would
14 be may grant a stay if those elements are satisfied.
15 But there is no obligation, even if all the elements are
16 satisfied, for the Board to grant the stay.

17 Just briefly, to, to cover the four elements
18 of the rule from the perspective of the Executive
19 Secretary. Sevier Power, in the case of the Sevier
20 Power appeal, Sierra Club has been granted amicus
21 status. They will be able to participate, albeit not as
22 a full party.

23 They will partic -- they have participated
24 in both the Intermountain Power and Sevier Power appeals
25 for, for the notice of intent stage of the permits --

1 approval orders. They submitted extensive comments.
2 They were at the hearings down in Millard County and
3 Sevier County.

4 Their viewpoints and their issues have been
5 raised to the Division. The Executive Secretary, when
6 he made the decision to issue the permits, factored in
7 the information that was submitted and the arguments
8 that were raised by the Sierra Club. So the arguments
9 have been raised.

10 I think it's worth pointing out also, as
11 Mr. Haley said, the Sierra Club, in the, in the eyes of
12 this Board, was not able to convince the Board that they
13 were harmed enough to have standing. Which is a lower
14 standard. They -- it would be hard to argue that
15 they're being harmed on a higher -- to a higher degree,
16 rising to irreparable harm, to grant the stay.

17 In fact, Sierra Club's own motion seems to
18 suggest that there may not be any harm at all. Sierra
19 Club mentions that there will be harm to the environment
20 if the permits are issued and all and these plants are
21 allowed to be built. But they also say that there won't
22 be any harm to the other parties because the plants
23 aren't going to be built anytime soon.

24 Which just begs the question of why a stay
25 is necessary if the plants, which would presumably,

1 according to the Sierra Club, emit more pollutants, the
2 very harm they fear, if the plants aren't going to be
3 built anytime soon, or at least before the Court of
4 Appeals makes a decision on their standing denials, why
5 there is any need for a stay at all.

6 Secondly, as a related matter, the alleged
7 threat of injury to the Sierra Club does not outweigh
8 the damage to the Executive Secretary. This is an
9 important point to the Executive Secretary and the
10 Division of Air Quality. Sierra Club is not yet a party
11 to these proceedings. Non-parties should not be
12 permitted to use an administrative stay, which is what
13 they're asking for here, to interfere with the ability
14 of the parties to these appeals to seek a resolution of
15 their dispute.

16 It's very likely that if the stay is granted
17 Sierra Club will argue not only that the existence of
18 the stay enjoins the parties from taking any action
19 formally before the Board, but it would also allow them
20 to -- in effect to veto any discussions of settlement
21 among the parties. This approach is not contemplated by
22 the administrative process as outlined in the rules.

23 The Executive Secretary wants to protect the
24 Division of Air Quality's ability to perform its
25 regulatory mandate without a non-party's interference.

1 The Divi -- the Division of Air Quality meets routinely
2 with sources who have filed appeals to a notice of
3 violation or request for agency action to resolve those
4 permit and compliance issues after the Executive
5 Secretary has issued a final order.

6 If the Court of Appeals determines that the
7 Sierra Club is a party, it is true that these
8 proceedings would begin again. However, if -- the
9 Executive Secretary submits that it would be against the
10 public interest to force the parties who are actually
11 parties in these proceedings to sit on their hands for
12 12 to 18 months, or possibly longer, until the Court of
13 Appeals rules on the standing determinations.

14 And just to wrap up -- I don't want to take
15 too much time, because the other parties have done a
16 very good job of covering the, the elements of the rule.
17 Whether this request for agency action issue presents
18 issues of public importance, that is a straight out of
19 the standing test.

20 Just two months ago, this Board determined
21 that the issues that Sierra Club was presenting did not
22 rise to the level of significant public issues. It
23 would seem very strange now for -- to apply the same
24 test for a motion to stay, and argue that all of a
25 sudden the issues have become serious enough in the last

1 two months to warrant the issuance of a stay. Thank
2 you.

3 THE CHAIR: I'd like you -- if you would
4 like to make a rebuttal. And then we'll open it to
5 questions from members of the Board to any of the
6 parties.

7 MS. WALKER: Thank you. Initially I'd like
8 to correct a suggestion that the standard of review that
9 the appellate court would apply would be arbitrary and
10 capricious. Actually, the standard of review and what
11 that means is how much deference the Court of Appeals
12 would give this Board.

13 Because standing is a question of law, and
14 particularly in this case, where the Board did not
15 question the facts that the Sierra Club and the Grand
16 Canyon Trust put forward. Those facts were taken as
17 given, and merely applied to the law, or the law was
18 applied to those facts. In that case the standard
19 review gives no deference to this Board.

20 Therefore, the standard that we have to meet
21 in order to overcome this Board's decision is
22 essentially we just have to show what the law would say.
23 No deference is given to your decision. So to the
24 extent that -- the suggestion is is that we have this
25 giant hurdle to overcome.

1 That's not valid. We're essentially
2 starting over, with the Court of Appeals. On the basis,
3 certainly, of what was in the record, but we don't have
4 to sort of overcome your decision.

5 It's true that the stay is discretionary.
6 And, as you also know, there's a provision that we
7 quoted in our brief that gives you discretion to provide
8 a remedy during the pendency of -- well, I'll just read
9 it.

10 It says: Unless precluded by other statute,
11 the agency may grant a stay of its order or other
12 temporary remedy during the pendency of its judicial
13 review according to the agency's rule. So essentially
14 it's wide open for you to make the determination that
15 you feel is best in this case.

16 On this issue of harm, the -- first of all,
17 the focus of the harm in the standing case is harm by
18 the project. So completion of the project approved by
19 the permit, essentially. The issue of harm here today
20 under the four-part test is the harm that the Sierra
21 Club would suffer if the proceeding goes forward. So
22 the harm is essentially what would happen to us if
23 discovery occurs, scheduling occurs, that sort of thing.

24 And on the flip side of that is that
25 currently there is no stay of the construction of the

1 facilities that have been approved by the permits. So
2 all this suggestion that the parties are gonna -- or
3 that the applicants are gonna be harmed by some delay in
4 their ability to build things or to acquire coal is
5 irrelevant, because there's no stay.

6 We're asking for a stay of the proceeding.
7 Currently there is no stay of the construction of the
8 facilities. Now, it doesn't say we won't ask for one
9 somewhere down the line, but we haven't asked for one
10 yet. Because, as far as we know, there's no proposals
11 right now to actually go ahead and do that.

12 There's also been this issue of bonds. Now,
13 first of all, the issue of bonds is not in your
14 four-part test. And secondly, typically when
15 environmental groups and public interest groups seek
16 stays, typically they are not required to post bond.
17 Or, if so, it's very minimal. You know, that's a whole
18 'nother issue that essentially would have to be decided
19 by the Court of Appeals.

20 But there's no guarantee that we're -- that
21 the Sierra Club is gonna be forced -- if they get a stay
22 from, for example, the Court of Appeals, there's no
23 suggestion that, that we would be forced to post some
24 giant bond. Typically, public interest groups don't
25 post bonds. Or, if they do, they're very small.

1 Okay, the -- then there was the suggestion
2 that what the EPA says doesn't matter. It's true that
3 the EPA is the interpreter of the Clean Air Act. And
4 it's true that this whole proceeding is essentially the
5 State of Utah's implementation of the Clean Air Act.
6 Therefore, what the EPA says does matter. Particularly
7 because the EPA holds authority over Utah's ability to
8 implement the Clean Air Act.

9 And there was this suggestion that, because
10 Sierra Club has submitted comments along -- during the
11 comment period provided by the Division of Air
12 Quality -- which, of course, we appreciate those
13 opportunities -- that somehow all our needs have been
14 met.

15 Well, the whole point of having a proceeding
16 and judicial -- ultimately possibly judicial review of
17 the decision of the Division of Air Quality is because
18 the idea is that you want independent review. And
19 that's what this Board is supposed to do; independently
20 review the decisions of the Air Quality Board.

21 Up until now, the Air Quality Board has made
22 all the decisions. Albeit based on public input, but
23 there's been no independent review of that decision.
24 This proceeding is supposed to allow independent review.
25 It's not at all the same as making comments it -- the --

1 in the public comment period.. It's just not the same
2 thing.

3 And the suggestion that settlement could
4 occur merely underscores the harm that Sierra Club would
5 suffer if settlement were allowed to be negotiated while
6 it was seeking judicial review of this Board's decision.
7 I mean, essentially a settlement goes a long way towards
8 resolving the issue completely.

9 If we're entitled to full-party status, we
10 would have to be a part of those settlement
11 negotiations. So the sug -- the suggestion that, that
12 somehow the Board shou -- I mean the DAQ shouldn't be
13 hampered in its ability to conduct settlements merely
14 underscores the fact that Sierra Club should be involved
15 in anything that occurs, or would be if it was granted
16 full-party status.

17 And that these sort of decisions, that have
18 a lot of impact on this proceeding, shouldn't be allowed
19 to made -- be made until the Court of Appeals addresses
20 our -- the standing issue. And there was a suggestion
21 that the Sierra Club is turning these arguments on --
22 well, that, that the Sierra Club is somehow saying --
23 trying to remove jurisdiction of this matter from this
24 Board and placing it in the Court of Appeals.

25 But by the same token, when the applicant

1 suggest that you shouldn't grant a stay because the
2 Court of Appeals should do that, they're doing the same
3 thing. I mean, this question is squarely before you.
4 It's an issue that matters to your proceeding. This is
5 your proceeding, and therefore you should make a
6 decision.

7 And I think that, given particularly that
8 there is no stay on construction, so that the parties --
9 the applicants presumably can start building tomorrow if
10 they want to. That there is no real harm except for to
11 the Sierra Club, because they're being excluded from a
12 proceeding.

13 The longer it goes on, the more prejudice
14 the Sierra Club will incur. That really wouldn't harm
15 anyone if it were delayed, particularly given because no
16 one is being prevented from constructing their
17 facilities in the meantime.

18 And I think the final issue is is that
19 standing is confusing. And the courts are better
20 positioned to address it. They wrote the opinions that
21 you are trying to apply to our facts. And, because
22 there may be questions still in your own mind -- maybe
23 not -- but certainly you realize that this is an issue
24 new to you, that's accustomed to the courts.

25 Let them decide it, before the Sierra Club

1 is prejudiced in this matter. Thank you very much.

2 THE CHAIR: All right. Do Board members
3 have questions for any of the parties? Okay, we have
4 Marcelle, and then Jerry, and then Steed.

5 MS. SHOOP: Mr. Chairman, I'm not sure who
6 to address this question to, but I just wanted to get
7 some clarification with respect to the IPP matter. In
8 terms of the status of the permit and, and the appeal,
9 as I understand it, the only stay that's being requested
10 is the stay relative to IPP's appeal on a -- Condition
11 24; is that correct?

12 MR. NELSON: That is correct.

13 MS. SHOOP: And so if -- the permit has not
14 yet been issued?

15 MR. NELSON: No. The permit has been
16 issued. I -- that's, that's a point that I think needs
17 clarification. The permit has been issued, in both
18 circumstances, by the Executive Secretary. And
19 Ms. Walker is correct in that both companies could start
20 to construct tomorrow under that permit. There is no
21 stay of that construction.

22 Now, as a practical matter there may be a
23 stay because of financing, or company decisions that
24 they want a final permit before they begin. But from a
25 legal standpoint, there is no stay on the construction.

1 What this Board is being asked to decide in those permit
2 appeals is the validity of the provisions of the permit.

3 And for the IPP matter, the only matter left
4 pending before the Board is the IPP challenge to a
5 provision in the permit. But if IPP wanted to construct
6 on the basis of the permit as it's been issued, it
7 could.

8 MR. GROVER: But then what would be the
9 result if they are ultimately not successful in the
10 appeal? I mean, the approval order would then be
11 modified. So they would have started construction on a
12 permit that --

13 MR. NELSON: And, and that's part of the
14 decis --

15 MR. GROVER: -- is in flux.

16 MR. NELSON: That's part of the
17 decision-making process that IPP has to deal with.

18 THE CHAIR: And the Condition 24
19 specifically addresses emissions during start startup
20 and shutdown and upset, which really could -- it could
21 potentially affect hardware, but not necessarily. But
22 that, that is the issue. Do you have another question?

23 MR. GROVER: I did. I just had a question
24 for the Sierra Club. Just, since we aren't part of all
25 the briefings in the circuit court appeal -- thank

1 goodness.

2 MR. NELSON: Well, at this point the only
3 briefing is a two-page --

4 MR. GROVER: Okay.

5 MR. NELSON: -- document that says "we
6 appeal."

7 MR. GROVER: Okay, well that was my
8 question. Is have you asked the Circuit Court of
9 Appeals for stay of these proceedings pending a termi --
10 determination of your standing issue?

11 MS. WALKER: The -- we have to ask you
12 first. That's the way the --

13 MR. GROVER: So it's not --

14 MS. WALKER: -- process is laid out. So we
15 ask you first. Which is why, if you remember, we were
16 in such a hurry, because --

17 MR. GROVER: So they wouldn't determine it's
18 not right until we've determined -- made our
19 determination is what you are saying?

20 MS. WALKER: Basically. I mean, the way it
21 goes is we ask you first. Either you -- and then based
22 on your decision here, we go to them. If you grant us a
23 stay, then we just go straight to the merits. If you
24 don't, then we ask them for a stay.

25 MR. GROVER: Okay. I just wanted to know

1 what the request of the court currently was.

2 MS. WALKER: Right. So, so we haven't asked
3 yet, no. We're waiting for your decision.

4 MR. BURWELL: So being new to the Board,
5 have you presented a case as to why you want the stay?
6 Is it around the nature of what these power plants
7 are -- you know, the type of power plants that they are
8 and the impact on the air quality? Is that -- has that
9 been articulated --

10 MS. WALKER: Yeah. I think --

11 MR. BURWELL: -- to the Board members?

12 MS. WALKER: I, I think what you are asking
13 is if we've provided the basis for essentially what --
14 an appeal of the, of the Department of Air Quality
15 decision on the permits. And yes, we have. That's in
16 our request for agency action.

17 And we laid out, I'm forgetting, but I think
18 19 very specific points with regard to the IPP plant,
19 and I believe 9 or so with regard to the SPC plant. And
20 they deal with emissions, visibility, impacts on
21 national parks, things like that. And I would hope that
22 you have been provided with those pleadings.

23 MR. NELSON: Because he is a new Board
24 member, I don't know whether you've been sent previous
25 packets. But that doesn't matter. I --

1 MS. WALKER: Uh-huh.

2 MR. NELSON: I think you just got the motion
3 for stay.

4 MR. BURWELL: I believe so, yeah.

5 MS. WALKER: Okay. But maybe -- I -- it
6 will probably be too late to -- once you get them the
7 Board will have made a decision already. But
8 essentially, you know, they're based on the, the issues
9 we raised.

10 MR. BURWELL: Your assessment of the
11 emissions for the two plants?

12 MS. WALKER: Yeah, and the permitting of
13 those emissions, essentially. They focus on, on those
14 And whether they comply with state and federal law.

15 MR. BURWELL: And you mentioned the Grand
16 Canyon Trust. You represent both; two different,
17 disparate, distinct entities?

18 MS. WALKER: That's right.

19 THE CHAIR: Mr. Horrocks?

20 MR. HORROCKS: Ms. Walker, in your initial
21 presentation you made a statement that if this Board
22 denies the motion for stay, that we would essentially be
23 denying the Sierra Club access to the courts. I was...

24 Did I miss hear you? Did -- or could you
25 elaborate?

1 MS. WALKER: No. Well, I, I don't know if
2 you misheard me or not. But certainly if that's what I
3 said, it's very confusing. What I meant is, you know, I
4 brought up this whole issue of, of the EPA and whatnot
5 to suggest that this is a complicated situation that
6 should be handled by the courts. And that this raises a
7 lot of questions. Let the courts deal with it.

8 Issue a stay in the meantime because, from
9 our perspective, fairness requires it. But what I
10 wanted to say is that, when I was quoting the EPA saying
11 the Clean Air Act requires judicial review of PSD
12 permits, that in our situation here in Utah, essentially
13 whatever standard that is applies to this Board as well.

14 And the two reasons are is that the standing
15 requirement is the same for the Board as it is for the
16 courts because the Board is trying to apply the, the
17 court standard to this proceeding. And the second is is
18 because to, to -- under our Administrative Procedures
19 Act no entity can go straight to the courts without
20 going through this Board, because they are required to
21 exhaust their administrative remedies.

22 So essentially the point I was trying to
23 make is, is that what the EPA says about standing is
24 re -- and standing relative to the courts, is relative
25 to the -- it matters to this Board as well. And the

1 point being that it just shows that there's a lot of
2 confusing issues to be dealt with.

3 And that this really matters, because it
4 reflects not just on these two permits, but on the
5 entire way that Utah goes about implementing the Clean
6 Air Act. So it's a big issue. And that suggests that
7 that fourth factor has been met. Does that help? Okay.
8 Sorry, it's kind of confusing.

9 THE CHAIR: Other questions/comments by
10 members of the Board?

11 MS. SEGhini: Yes, I have a question. In
12 terms of the court action...

13 THE COURT REPORTER: I'm sorry ma'am, can
14 you speak up?

15 MS. SEGhini: Yes. In terms of the court
16 action, is this an action being brought by the Sierra
17 Club to determine standing? Is, is that what the
18 appellate court action is?

19 MS. WALKER: That's right. So we've, we've
20 already filed essentially a petition for review of your
21 decision denying us standing. And we've done that
22 already.

23 MS. SEGhini: So you would have full ability
24 to interact in terms of that court process because you
25 filed a case, would you not?

1 MS. WALKER: Yeah. But what we're --

2 MS. SEGHINI: To defend your position that
3 you do have standing?

4 MS. WALKER: Yes. But what we're asking the
5 Board to do in the meantime while we're working that
6 out -- and I'm certainly not complaining about our
7 access to the Court of Appeals. We're fine with that.
8 But what we're saying is in the meantime would you hold
9 up, delay these proceedings.

10 So that if it turns out that we're right and
11 we have standing, that we're not prejudiced by the fact
12 that the proceedings have gone forward without us. So
13 certainly we're plenty happy with our ability to seek
14 review of your decision.

15 MS. SEGHINI: Thank you.

16 THE CHAIR: Any other questions? Probably
17 for the benefit, since we've had a -- oh, yes. We'll
18 give Mr. Finlinson, yes.

19 MR. FINLINSON: Mr. Finlinson. I'd just
20 like to offer a rebuttal piece of information. The
21 question is could the plant go forward because we do
22 have a permit that authorizes us to construct. It was
23 granted by the Executive Secretary. But in today's
24 market you wouldn't get past first base, in terms of
25 anybody who had to put up the financing for that project

1 of saying, "Do you have a valid permit?"

2 We'd say, "Yes, we have a valid permit. But
3 it's subject to the review process that we're presently
4 going through." And that process of being able to say,
5 "Yes, we have a valid permit," will probably take longer
6 if it goes through the, the question in the Circuit
7 Court of Appeals on standing.

8 But even though we have a permit, I can
9 assure you that we don't have 500 million -- speaking of
10 the current company -- to go do that. My guess is the
11 Intermountain Power Project doesn't have the additional
12 money that they have -- would be required to come up
13 with, until that permit issue is resolved through the
14 review process. Both the administrative and the
15 judicial process.

16 So you are not going to see construction
17 until their permit that is gone through the process of a
18 review.

19 MR. HALEY: Just for the record --

20 THE CHAIR: Yeah, let's Mr. Haley and
21 then...

22 MR. HALEY: Just for the record, IPA/IPP
23 joins in the comments of Mr. Finlinson. That would go
24 for us as well.

25 MS. SHOOP: I just had a quick question of

1 Mr. Finlinson. As I understand, what you just said is
2 that regardless of, of -- however long it takes for this
3 matter to work its way through the Utah court systems is
4 however long it's gonna be before the power plant is
5 constructed?

6 MR. FINLINSON: Exactly. On, on either
7 power plant.

8 MS. SHOOP: So is there really harm to the,
9 the power companies if this proceeding is stayed if, if
10 what is really the, the thing that's gonna hold you back
11 is the, is the Court of Appeals process?

12 MR. FINLINSON: Well, yes. But in the Court
13 of Appeals there's the protection of whatever that bond
14 will be. And she suggested that it would be minimal or
15 small. And, of course, we're gonna urge the court to,
16 to get it to reflect the true amount of the damage.

17 And there is a process in the appellate
18 procedure for the presentation of the different opinions
19 of what that bond ought to be while -- if, if they
20 considered granting the stay. Now, the test at a -- the
21 Court of Appeals are basically the same tests that you
22 have. It's still a four-part process. And, and it will
23 be contested there as well.

24 But the net result is if, if that stay is
25 put in place, where if you grant it, that stops us from

1 proceeding down the road to reviewing the rest of the
2 issues that have been raised on whether or not the
3 permit that was granted by the Executive Secretary is
4 correct, and is a valid permit.

5 That extra delay, we think, is detrimental
6 to the, to the power companies. Both power companies.
7 Both of you submitted -- both of us have indicated that
8 to you today. The difference is if you grant a stay, we
9 don't have the protection of whatever the bond is going
10 to be in the event that they fail.

11 We submit that there's a pretty good
12 likelihood that they'll probably fail. But in the
13 appellate court, they have to deal with that issue.
14 whatever protection is afforded by the, the bond is
15 simply not available at this level.

16 MR. HALEY: May I address your question from
17 my perspective?

18 There would be an additional practical
19 problem that we would have, in terms of trying to reach
20 a resolution on the, the SS --
21 startup/shutdown/maintenance issue. If there was a stay
22 issued, that would stop basically everything.

23 Right now, while the appeal of the standing
24 issue is going forward, we could continue to try to
25 resolve the remaining issues on, on the, the

1 startup/shutdown and maintenance point. Where a stay --
2 if the stay was issued, it would stop everything. We'd
3 have to wait for the appeal to come, and then come back
4 to where we are right now.

5 So it would be inefficient from that
6 perspective. And then there's also the bonding issues
7 that -- we think if they're -- if they want to proceed
8 with the appeal, then we will argue in the Court of
9 Appeals that they should -- the Sierr -- "they" being
10 the Sierra Club, should have to post a bond for the
11 damages that we would incur as a result of a delay on
12 going out to the capital markets, or to a lock in our
13 long-term coal contracts.

14 MS. SEGhini: I have another question.

15 THE CHAIR: Yes.

16 MS. SEGhini: My question is this. The
17 previous decision of the Board was -- indicated that the
18 Sierra Club had no standing. And that is what they're
19 appealing. Would it make a difference in their ability
20 to participate in discussions if we, as a board, give
21 them amicus standing -- if I'm saying that correctly --
22 so that they, then, would be part of the discussion,
23 even though they wouldn't have legal standing?

24 MR. NELSON: Let me comment. They were
25 granted amicus standing in the Sevier Power Company

1 proceeding. There was no grant of amicus in the IPP
2 proceeding.

3 The, the difference between amicus and party
4 status, as best I can describe it, is that when you are
5 a party you have a right to fully participate in the
6 proceedings. Which means that you can present
7 testimony, present witnesses, file motions, cross
8 examine. And participate as if you were one of the, the
9 parties like the Executive Secretary and the company.

10 An amicus status gives an ability to present
11 a brief or make oral comments on what has been
12 presented. And so you can file briefs on issues. You
13 can file information with respect to what the record is.
14 But it does not require any kind of a legal standard to
15 be granted participation. Amicus is just at the
16 discretion of the Board.

17 The party status, however, you have to
18 demonstrate, as we went through the process, of
19 standing, and the ability to participate and demonstrate
20 the intervention requirements.

21 MS. SEGhini: I have one other question, and
22 I apologize because I missed the last meeting. As we've
23 gone through the permitting process, have we not
24 carefully examined the emissions standards and the
25 expected emissions from these two plants, and whatever

1 are the inventories that exist in that area?

2 MR. NELSON: The, the Executive Secretary
3 went through that process as part of the permitting
4 process. The status we are at at this part of the
5 proceedings, though, is that they have presented
6 challenges to those decisions. And that's what this
7 Board is adjudicating.

8 MS. SEGHINI: "They" being?

9 MR. NELSON: The Sierra Club.

10 MS. SEGHINI: The Sierra Club?

11 MR. NELSON: And the Citiz --Sevier
12 Citizens' Group.

13 MS. SEGHINI: Thank you.

14 THE CHAIR: Couple comments. It's a little
15 awkward here, because we've had several board members
16 who weren't here two months ago when we made the
17 decision. Power plants, of course, have been around for
18 a long time. But not many power plants have been built
19 in the last 20 years.

20 So a lot of the issues that are being
21 brought up are in the interpretation of what does best
22 available coal technology mean in a plant built in 2005.
23 And those are issues subject to interpretation. And
24 that is what has been raised. But by majority vote of
25 the Board, we denied Sierra Club standing in those

1 issues two months ago.

2 First, I am a little uncomfortable with
3 that. But, you know, we do vote by a majority vote.
4 And it was a -- in the statement that I signed on behalf
5 of the Board, we found that this power plant
6 construction is not a major public issue.

7 For someone who's been involved in Western
8 Regional Air Partnership, we go through all these
9 meetings, we talk about dust, and we talk about
10 vehicles, but we always get back to stationary sources.
11 They're the big one that affect air quality in the West.

12 And the WRAP has certainly devoted a
13 substantial amount of its resources to the best
14 available retrofit technology for the plants that
15 predated BART. The upgrading of power plants, such as
16 the initiative that PacifiCorp has taken on their own to
17 reduce emissions from the plants.

18 So I think they are major public issues, as
19 proven by how much time we spend talking about it in
20 forums like the WRAP. And it's also been said, "Well,
21 the citizens have had their chance, during the public
22 comment period, to provide their input." And that --
23 but that's the, the advocates talking to the agency
24 staff.

25 As a board, we are the ones who are supposed

1 to review whether the staff correctly interpreted -- or
2 correctly applied what was presented in the hearings.
3 Again, by a majority vote, we chose not to do that. I'm
4 personally gonna welcome -- would welcome the guidance
5 of a court on these complicated questions of standing.

6 And I think that's what's before us. So
7 there -- that's my input. Is there other discussion
8 from members of the Board before we ask for a motion?

9 MR. BURWELL: Well, I -- can I make a
10 comment? As a new member it, it seems as if, you know,
11 I've joined the Economic Development Board as opposed to
12 an Air Quality Board. And it seems like our
13 responsibility is around air quality, not the arguments
14 put forth around the economic impact on a couple power
15 plants.

16 And from that standpoint, you know, the fact
17 that an organization has raised questions around the air
18 quality impact of two projects, and as a board we did
19 not give them standing, you know, raises questions
20 around what our motivation, our goals, and objectives
21 are.

22 Again, if, if the arguments by another
23 organization are these impact the air quality, and the
24 arguments by the other projects are around the economic
25 impacts of the project, you know, what, you know, I

1 think -- isn't it our responsibility to enforce the air
2 quality of the state for the citizens? And make sure
3 that we're doing the right thing in that regard?

4 MR. GROVER: Well, I think the law requires
5 us to look at harm. It didn't say any air quality harm.
6 We don't really operate in a vacuum is what I'm saying.
7 Yeah, we deal with air quality issues. But when the law
8 says we have to follow and look at certain things, one
9 of which is harm, then we have to look at it.

10 So, I mean, I understand what you are
11 saying. And it seems like we're getting off into areas
12 that we don't know, that we think we're experts at,
13 perhaps, because we're here because of our air quality
14 knowledge. But, you know, having sat through the
15 hearings and everything, we were required -- the law
16 specified exactly what we were supposed to determine for
17 standing.

18 And it was harm. We had to determine
19 whether there was harm or not harm to those that were
20 actually petitioning. So -- it would have been nice if
21 we didn't have to, but that's what the law required us
22 to do. So, I mean, I'm just kind of defending the
23 position. And there was a lot of discussion about that
24 during the meeting. So it wasn't --

25 MR. BURWELL: Harm, harm to the parties, or

1 harm to the air?

2 MR. GROVER: Well --

3 MR. SAMUELSON: Harm to the parties.

4 MR. BURWELL: Okay.

5 MR. GROVER: But the Sierra Club made
6 arguments that actually talked about environmental harm
7 as well --

8 MR. BURWELL: Okay.

9 MR. GROVER: -- the public advocacy
10 position. So there was all of that. There was all --
11 elements of that. But I think specifically we looked to
12 what the -- the law required us to make a finding as to
13 whether there was harm or not, so.

14 And I think that's one of the standards here
15 again, is another irreparable harm. We have to look at
16 that. That could be -- it doesn't say just air quality.
17 You have to say, you know. If us, by staying an air
18 quality decision, we'd have to look at the harm that
19 would result from that from an economic standpoint as
20 well.

21 So I don't think it limits us just to
22 environmental harm. Maybe Fred can correct me if I'm
23 wrong, but.

24 MR. NELSON: The -- you are looking at, with
25 respect to a stay, at the harm, again, to the parties,

1 and the relative positions of the parties, when you are
2 talking about staying a proceeding. The, the courts
3 and --

4 The reason that this standard is set with
5 the requirements that are listed there, and it marries
6 up as was indicated with what the judicial process would
7 be in granting a stay, is that there is a -- there is
8 usually a deference on the part of the court to maintain
9 the status quo.

10 Whatever decisions have been made should
11 stay in place, unless you can demonstrate those four
12 criteria. And if those four criteria then meet certain
13 requirements, then the Board or the court will step in
14 and say, "We're going to go outside the status quo for
15 the moment and put a stay in place." Depending upon
16 those criteria, and those criteria being met.

17 MS. BUNKER: In regard to Mr. Grover's
18 comments, I am assuming that when this was discussed
19 before, all of these things were discussed. It, you
20 know, pro and con and everything, when the -- when you
21 had the, you know. This wasn't held in a vacuum; is
22 that right?

23 MR. GROVER: Well, there was, I don't know,
24 at least two or three inches of briefs on --

25 MS. BUNKER: That's what, that's what,

1 that's what I'm saying, you know. So all of these
2 different aspects were discussed?

3 MR. GROVER: Well, I don't know how in
4 depth. I mean, you know, you have to review the
5 minutes. I'm not trying to represent something that
6 maybe isn't in the minutes. I'm just saying there was
7 discussion. There -- we did go through all those legal
8 points. We did talk about -- each party had a chance to
9 make their case --

10 MS. BUNKER: So all of this was -- all of it
11 was discussed?

12 MR. GROVER: Yeah. I --

13 MS. BUNKER: Okay.

14 MR. NELSON: You had a copy, in your packet,
15 of the orders --

16 MS. BUNKER: Right, right.

17 MR. NELSON: -- of the Board --

18 MS. BUNKER: Right.

19 MR. NELSON: -- and the discussion, and the
20 rationale.

21 MR. GROVER: And one of the things is we
22 didn't have this unanimous voice, either. Which the
23 Chair has indicated. Which probably precipitated a lot
24 more discussion than being fairly unanimous. So I do
25 think it was -- a lot of areas were explored, and a lot

1 of questions were asked.

2 MR. NELSON: There was a split --

3 MS. BUNKER: However --

4 MR. NELSON: There was a split vote on every
5 motion.

6 MS. BUNKER: But whatever, the majority
7 ruled on that though, you know. That wasn't -- that was
8 the voice of the Board. After, you know. Whether it
9 was 5-4 or, you know, 6-1, whatever. That is -- that
10 was the voice of the Board.

11 MR. NELSON: Right.

12 MS. BUNKER: Right? Okay.

13 THE CHAIR: So.

14 MS. SEGhini: Just in, in terms of the
15 discussion. Is our job to protect industry, or is our
16 job to protect the environment? And our job always is
17 to protect the environment. That's why we regulate
18 industry. And that's why we look at the regulations.
19 That's why we have very rigid requirements before
20 permits are, are issued.

21 Certainly the, the stationary sources are
22 going to emit a certain amount of pollution. But in our
23 society if we can control that so that it meets the
24 requirements for a healthy environment, then we can
25 function better as a society. I hate to think what it

1 would be like to be without electricity.

2 MR. GROVER: I think, I think we're kind of
3 presupposing, though, that that's what the -- that's
4 what the rules and all the determinations that are made
5 by the Executive Secretary takes that into
6 consideration. I mean, I -- I'm just saying I, I don't
7 know that -- we weren't really reviewing the big global
8 environmental, you know, regulatory scheme when we were
9 reviewing it.

10 We were just reviewing the specifics of this
11 particular request involving this permit which the
12 Executive Secretary had granted, and said it had been
13 reviewed, and that the laws had been followed. And I
14 think, you know, Mr. Veranth raised an issue. Maybe
15 there's some interpretation he didn't agree with.

16 But that wasn't the determination of the
17 Executive Secretary. And the petition was to say -- you
18 know, to take that basically from the Executive
19 Secretary to review -- the Air Quality Board to review
20 that. Which they did. And one...

21 THE COURT REPORTER: I'm sorry?

22 MR. GROVER: Speak up? Okay. For one of
23 the applicants. But for the other we just didn't find
24 they had the standing to raise the issues, because they
25 didn't meet the specific criteria that the law required

1 us to review, so.

2 MS. SEGhini: Okay.

3 MS. SHOOP: I have a question. It's
4 probably for the attorneys. But I guess my question is
5 how would it affect the appellate process if the Board
6 were to permit a stay of the proceedings only for a
7 limited period of time while the parties asked the court
8 to determine whether or not a stay -- a full stay was
9 appropriate? I don't even know if that's possible,
10 procedurally possible.

11 THE CHAIR: I guess...

12 MR. NELSON: You want me to comment? I
13 think that the Board can do whatever it wants to on the
14 particular kind of matter. If that's what the Board
15 decides it would like to do, it has the authority to do
16 that.

17 MR. SAMUELSON: Mr. Chairman? You know, I,
18 I am struck by Mayor Seghini's comment, you know, that
19 it is our duty to protect the environment. And I fully
20 endorse that. And she also mentioned, you know, can we
21 envision ourselves living in a community or a world
22 without electricity. And I think most of us cannot.

23 The rules and regulations, the standards
24 that we have, don't represent what's healthy and what's
25 not healthy. None of this is healthy. Okay? What it

1 represents is the best possible compromise of our -- the
2 existing technology and what lungs can tolerate.

3 And so while we, we have to balance that, I
4 think it's, it's much more a question of degree rather
5 than black and white. We have to balance the need for
6 power. And I think we would all have to admit that we
7 have a need for power. We also have to balance that
8 against the fact that, that any amount of these
9 pollutants is unhealthy.

10 It's a question of degree. We can probably
11 exist longer with less. But can we exist at all without
12 electricity? So, you know, I -- as I'm listening to
13 both arguments I'm struck by, you know, the tendency to
14 declare one side wrong and one side right. And
15 obviously it's never that simple.

16 For me the question seems to be, who is
17 harmed most? And does our granting a stay really result
18 in tens of millions of dollars to the power companies?
19 In which case, that's considerable harm. Does our
20 denial of a stay prevent the Sierra Club from pursuing,
21 you know, their mission of protecting the environment.
22 These are not clear-cut questions.

23 It sounds to me that no matter what we do,
24 this ends up in court; is that correct?

25 THE CHAIR: Probably.

1 MR. SAMUELSON: Okay. Is, is there any
2 action of the Board that prevents this from ending up in
3 the court.

4 MR. NELSON: Well, it really is already in
5 court on the, on the motion to intervene. Let, let me
6 describe what I think the two choices are. The choice
7 of denying the stay means that this Board would go
8 forward with the proceedings.

9 That means that you would hear the IPP
10 appeal of its own permit on that particular provision.
11 You would also hear the Sevier Power Company appeal by
12 the Sevier Citizens' Group. You would go forward with
13 that proceeding.

14 If, at some point in time, the Sierra Club
15 prevails in the Court of Appeals, they would then come
16 back to the Board and would be a party to the
17 proceeding. And at that point they would raise the
18 issues that they have raised in their petition to
19 intervene.

20 Depending upon where those two processes are
21 at the point -- at that point, they would -- there may
22 have been some decisions that the Board would need to
23 re-look at because they had not had a, an available
24 process to present their own witnesses or present their
25 own testimony. But they would not be denied an

1 opportunity to present evidence and information to the
2 Board, because they would then be a party.

3 You may have some kind of a precedent value,
4 because you've decided some issues with respect to
5 concurrent proceedings, that you would say, "Well, wait
6 a minute. We decided this. Now, in looking at this
7 information that the Sierra Club is presenting, do we
8 want to decide it differently?" Which is what happens
9 in courts every day. You have different parties arguing
10 different issues, and they then have precedence and
11 decisions.

12 So that would be the one process that the
13 Board would, by denying the stay, that would be the
14 process. If you grant the stay, what that would mean is
15 that the administrative proceedings would wait until the
16 decision is made by the appellate court. And, depending
17 upon how that decision went, the Sierra Club would be a
18 party to the proceedings or not a party to the
19 proceedings, and then the Board would go forward.

20 So that's the really the two options that
21 the Board has. Now, if there's any disagreement with my
22 description...

23 Uh-oh, there was.

24 THE CHAIR: Okay, I think we're gonna let
25 you.

1 MR. HALEY: George Haley on behalf of IPA
2 The only thing I just want to do is respond, first of
3 all, to what Ms. Shoop was saying about -- in terms of
4 modifying some kind of order pending the, the Court of
5 Appeals' determination of stay.

6 As a practical matter, it wouldn't be
7 necessary. They have to act, like right now. They've
8 already filed their appeal. So in order to have a stay
9 issued it would -- they would have to do it within the
10 next 30 days anyway. Nothing is gonna happen during
11 that time frame. So as a practical matter, that remedy
12 would already be there.

13 And then the only other thing in terms of
14 what Mr. -- what Fred was saying is that I just want to
15 draw the attention back to the four-part test. In order
16 to issue the stay it's not just weighing those two
17 issues, what you prefer. But you have to, you have to
18 decide that the Sierra Club has met all four of those
19 elements of the four-part test. Including the, the
20 damage issue. The irreparable harm issue. Which is
21 really the --

22 MR. NELSON: I, I appreciate that
23 clarification. My comments went simply just to the
24 process. Not the standard in making the decision.

25 THE CHAIR: Mr. Finlinson?

1 THE WITNESS: I just want to submit to you
2 an interesting observation. We have filed a brief that
3 thick (indicating), I think as Mr. Grover indicated.
4 And we haven't yet, with everything that's been
5 submitted, start to get at whether or not the decision
6 of the Executive Secretary was environmentally correct
7 and consistent within the Clean Air Act.

8 We have been involved in a procedural issue
9 of who can come and have a seat at the table. And we
10 have not yet, and, and until you start into the
11 administrative review of the actual permit, all of this
12 skirmishing that's going on is delaying the review to
13 see whether or not the decision of the Executive
14 Secretary was, in fact, consistent with the requirements
15 of the Clean Air Act to provide the right kind of
16 balance that we've been talking about that you need to
17 have, and see whether or not the application meets the
18 requirements for permitting a coal-fired plant.

19 So until we can get into the administrative
20 process, you are not really dealing with the issue of
21 what's in the permit. And whether the permit was the
22 appropriate thing to do. You are not protecting the
23 environment. We're skirmishing. And we're submitting
24 that granting a stay by this Board delays the
25 administrative review of whether or not the decision is

1 actually right.

2 THE CHAIR: Mr. Stephens and Ms. Walker?

3 MR. STEPHENS: Chris Stephens, Attorney
4 General's office. To use a very pedestrian analogy,
5 granting a stay is like hitting pause on a remote
6 control. Everything just kind of freezes where it is.
7 Now, depending on the side you are on, that either works
8 for you or it works against you. No matter what
9 decision the Board makes today, it's gonna have an
10 impact.

11 I just thought I'd point out though that,
12 like Mr. Finlinson was saying, we're dealing with the
13 legal aspects of whether the Sierra Club has
14 demonstrated that it has met the threshold requirements
15 for participating in these proceedings. Two months ago
16 the Board decided that it did not.

17 The standards for issuing a stay are not
18 overly different from the standards for establishing
19 standing. So I just want to encourage you as you, as
20 you weigh this decision, to reflect on the decision that
21 was made over standing. Where does the balance lie with
22 the harms -- the relative harms here?

23 If you ask Sierra Club, they're going to say
24 that not having a stay is harmful to them. If you ask
25 the, the Sevier Power and Intermountain Power, they're

1 gonna say that a stay harms them. From the perspective
2 of the Executive Secretary, it is not a wise use of
3 government resources to be hitting -- have your finger
4 stuck on the pause button for a year to a year
5 and-a-half.

6 THE CHAIR: Ms. Walker?

7 MS. WALKER: When, when Fred was describing
8 the two choices before the Board, I would agree with his
9 characterization of it. Except for, because I'm coming
10 at it from the point of the Sierra Club, I would suggest
11 that a process going on without a party is much more
12 prej -- prejudicial than he suggested. Because all
13 sorts of decisions are made along the way. And the
14 members of the Board start to form opinions and make
15 decisions.

16 And if they're not presented with all the
17 sides, including the side of the Sierra Club, then those
18 decisions that start to become ingrained aren't made
19 with the benefit of what the Sierra Club can do or can
20 present to the Board.

21 So in other words, to make well-rounded
22 decisions that are based on all the facts that
23 potentially the parties would want to bring to the Board
24 requires holding off on the process until all the
25 parties are or are not at the table, as the case may be.

1 So, so in other words, what I'm saying is
2 that to allow the process to go forward really does
3 impact our ability to influence you. That's what we
4 want to do. We want to have the chance to influence
5 you. And in order to do that, we need to be
6 participating as a full party.

7 And all we're asking is that you wait until
8 a decision on whether we're entitled to that is made by
9 the courts, so that you don't start to make decisions
10 and form opinions that we can't influence. Thank you.

11 THE CHAIR: Mr. Horrocks?

12 MR. HORROCKS: I, I agree with your start --
13 statement earlier, John, that this is somewhat awkward
14 today because of, of the new board members, and those
15 people that weren't present at the, at the main meeting.
16 Our focus in the main meeting was, was fairly narrow.
17 And that was to determine whether or not certain
18 entities had standing.

19 I believe the Board weighed that carefully.
20 Considered the, the guidelines that were, were given to
21 us by the various attorneys and, and attorneys
22 representing the different entities. Our decision
23 wasn't arbitrary and capricious. We weighed on it very
24 heavily. And we made the decision based on the
25 guidelines that we were constrained by.

1 Today, the issue in front of us is the same.
2 We have a fairly narrow focus. Okay, we're not weighing
3 what the, the decision of the executive director was,
4 was accurate or not accurate. We're weighing whether or
5 not to stay the, the motion for the Sierra Club.

6 And based on the four criteria that they
7 need to satisfy, I do not believe they've met all four.
8 And therefore I want to issue a motion that we deny
9 Sierra Club's motion for the stay on both the IPP and
10 the Sevier, Sevier County power plant.

11 (There was a second to the motion.)

12 THE CHAIR: Okay, we have a motion and a
13 second. We've been discussing this for about an hour
14 and 20 minutes or so. Are we ready for a vote?

15 MR. GROVER: I'm almost out of water, so.

16 THE CHAIR: Okay. We have a motion that
17 would deny the request for a stay. All in favor of the
18 motion?

19 (A vote was taken.)

20 UNKNOWN SPEAKER: Keep your hands up,
21 please.

22 THE CHAIR: Opposed? And the Chair is not
23 voting.

24 UNKNOWN SPEAKER: Only one opposed?

25 THE CHAIR: One opposed. And the Chair is

1 not voting.

2 UNKNOWN SPEAKER: Did anyone not vote?

3 MR. WESSMAN: The Chair did not vote, and
4 Mr. Wessman recused.

5 UNKNOWN SPEAKER: Okay, thank you.

6 THE CHAIR: All right. I think we have a
7 decision of the Board. Thank everyone for their
8 participation.

9 MR. HALEY: Thank you very much.

10 MS. WALKER: Just, Fred, just as a matter of
11 process, are you going to do another order that will be
12 signed soon?

13 MR. NELSON: Yes. I, I think it will be
14 a simple order. I'm not sure it needs to be brought
15 back to the Board. And so we'll just get an order
16 signed and, and I'll send it up to Mr. Veranth. It will
17 just be more of a procedural order. Did you have a time
18 frame that you were interested in getting that done by?

19 MS. WALKER: As long as it's soon, that's
20 fine with me.

21 MR. NELSON: Okay. "Soon" being? I mean...

22 MS. WALKER: Well, what do you mean by soon?
23 A week?

24 MR. NELSON: I was gonna work with that
25 effort, yeah.

1 MS. WALKER: Okay. And, and then just
2 another practical question. Is the transcript of
3 today's hearing gonna be made part of the record?

4 MR. NELSON: We could do that. I think it's
5 probably up to you to -- if that's your request, we
6 could do that.

7 MS. WALKER: Okay.

8 MR. NELSON: I mean, it -- I have to file a
9 transcript index -- or a record index by, I believe the
10 time frame the court set is 20 days from the time you
11 filed, and that means by next Monday. So what I may
12 have to do is file that record index, and then
13 supplement it.

14 MS. WALKER: Okay.

15 MR. NELSON: At a later time.

16 MS. WALKER: Well, I -- we would request
17 that this -- the hearing transcript be part of the
18 record. And if I need to do something to make -- to
19 facilitate that, if you would let me know.

20 MR. NELSON: I don't think you will. I
21 think we're going to get a copy of it, so that, that
22 will meet that requirement.

23 MS. WALKER: Okay. Thank you very much.

24 (The hearing on this matter was concluded at 3:12 p.m.)

25



C E R T I F I C A T E

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

This is to certify that the foregoing proceedings were taken before me, KELLY L. WILBURN, a Registered Professional Reporter and Notary Public in and for the State of Utah.

That the proceedings were reported by me in stenotype and thereafter caused by me to be transcribed into typewriting. And that a full, true, and correct transcription of said proceedings so taken and transcribed is set forth in the foregoing pages, numbered 1 through 68, inclusive.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action, and that I am not interested in the event thereof.

WITNESS MY HAND AND OFFICIAL SEAL AT KEARNS, UTAH
THIS 8th DAY OF June, 2005.

Kelly L. Wilburn
Kelly L. Wilburn, CSR, RPR
My Commission Expires:
May 16, 2009









\$	according - 27:1, 30:13 Accordingly - 7:22 account - 21:5 accurate - 66:4 accustomed - 34:24 acquire - 31:4 acquired - 17:8 acronym - 23:19 Act - 6:9, 18:10, 32:3, 32:5, 32:8, 40:11, 40:19, 41:6, 62:7, 62:15 act - 61:7 action - 7:10, 7:24, 27:18, 28:3, 28:17, 38:16, 41:12, 41:18, 41:18, 59:2, 69:12 actions - 8:4, 14:13 activities - 6:23, 9:2, 11:9 actual - 62:11 addition - 11:22 additional - 18:18, 43:11, 45:18 address - 12:4, 24:17, 34:20, 35:6, 45:16 addressed - 11:24 addresses - 33:19, 36:19 adequate - 7:12, 24:22 adjudicating - 48:7 adjudication - 12:7 administrative - 6:11, 6:25, 14:24, 27:12, 27:22, 40:21, 43:14, 60:15, 62:11, 62:19, 62:25 Administrative - 19:12, 40:18 admit - 58:6 adverse - 15:8, 15:10 advocacy - 9:3, 62:9 advocate - 11:18 advocates - 49:23 affect - 36:21, 49:11, 57:5 affected - 6:12, 6:19, 7:11, 7:20 afforded - 45:14 afternoon - 18:11, 24:14, 24:18 Agency - 23:20 agency - 26:3, 28:17, 30:11, 38:18, 49:23 agency's - 30:13 ago - 2:10, 5:25, 28:20, 49:16, 49:1, 63:15 agree - 18:16, 56:15, 64:8, 65:12 agreements - 20:25, 21:13 ahead - 13:1, 31:11 air - 17:9, 38:8, 49:11, 50:13, 50:17, 50:23, 51:1, 51:5, 51:7, 51:13, 62:1, 52:16, 52:17 Air - 1:1, 6:9, 14:21, 18:10, 27:10, 27:24, 28:1, 32:3, 32:5, 32:8, 32:11, 32:17, 32:20, 32:21, 38:14, 40:11, 41:5, 49:8, 50:12, 58:19, 62:7, 62:15 albeit - 25:21 Albeit - 32:22 alleged - 7:21, 27:6 allow - 9:10, 9:16, 21:13, 27:19, 32:24, 66:2 allowed - 6:13, 6:20, 11:7, 24:9, 26:21, 33:5, 33:18 allows - 16:17 almost - 68:18 alternatives - 7:15 amicus - 11:5, 11:8, 11:12, 11:25, 26:20, 46:21, 46:25, 47:1, 47:3, 47:10 Amicus - 47:15 amount - 18:10, 44:16, 49:13, 55:22, 58:8 analogy - 63:4 analysis - 8:9, 20:8, 20:14, 21:5 and-a-half - 20:9, 64:5 anytime - 26:23, 27:3 anyway - 61:10 apologize - 47:22 appeal - 5:11, 10:17, 10:18, 12:13, 16:3, 16:8, 19:18, 20:10, 22:21, 25:20, 35:8, 35:10, 38:10, 38:25, 37:8, 38:14, 45:23, 46:3, 46:8, 59:10, 59:11, 61:8 appealed - 2:15, 3:6, 16:7, 22:10 appealing - 2:17, 2:18, 46:19 Appeals - 1:4, 5:12, 13:7, 15:18, 19:17, 19:18, 19:24, 19:25, 22:11, 22:14, 27:4, 28:6, 28:13, 29:11, 30:2, 31:19, 31:22, 33:19, 33:24, 34:2, 37:9, 42:7, 43:7, 44:11, 44:13, 44:21, 46:9, 59:15 appeals - 2:4, 25:24, 27:14, 28:2, 36:2 Appeals - 61:5 appellate - 3:7, 5:21, 13:24, 29:9, 41:16, 44:17, 45:13, 57:5, 60:18 Appellate - 19:21 appellates - 13:16 applicant - 7:23, 18:8 applicants - 7:11, 8:4, 31:3, 33:25, 34:9, 58:23 application - 17:10, 19:22, 62:17 applied - 29:17, 29:18, 50:2 applies - 6:23, 25:4, 40:13 apply - 6:1, 6:2, 28:23, 29:9, 34:21, 40:16 appreciate - 24:17, 32:12, 61:22 approach - 27:21 appropriate - 4:2, 58:19, 62:7, 62:15 albeit - 25:21 Albeit - 32:22 alleged - 7:21, 27:6 allow - 9:10, 9:16, 21:13, 27:19, 32:24, 66:2 allowed - 6:13, 6:20, 11:7, 24:9, 26:21, 33:5, 33:18 allows - 16:17 almost - 68:18 alternatives - 7:15 amicus - 11:5, 11:8, 11:12, 11:25, 26:20, 46:21, 46:25, 47:1, 47:3, 47:10 Amicus - 47:15 amount - 18:10, 44:16, 49:13, 55:22, 58:8 analogy - 63:4 analysis - 8:9, 20:8, 20:14, 21:5 and-a-half - 20:9, 64:5 anytime - 26:23, 27:3 anyway - 61:10 apologize - 47:22 appeal - 5:11, 10:17, 10:18, 12:13, 16:3, 16:8, 19:18, 20:10, 22:21, 25:20, 35:8, 35:10, 38:10, 38:25, 37:8, 38:14, 45:23, 46:3, 46:8, 59:10, 59:11, 61:8 appealed - 2:15, 3:6, 16:7, 22:10 appealing - 2:17, 2:18, 46:19 Appeals - 1:4, 5:12, 13:7, 15:18, 19:17, 19:18, 19:24, 19:25, 22:11, 22:14, 27:4, 28:6, 28:13, 29:11, 30:2, 31:19, 31:22, 33:19, 33:24, 34:2, 37:9, 42:7, 43:7, 44:11, 44:13, 44:21, 46:9, 59:15 appeals - 2:4, 25:24, 27:14, 28:2, 36:2 Appeals - 61:5 appellate - 3:7, 5:21, 13:24, 29:9, 41:16, 44:17, 45:13, 57:5, 60:18 Appellate - 19:21 appellates - 13:16 applicant - 7:23, 18:8 applicants - 7:11, 8:4, 31:3, 33:25, 34:9, 58:23 application - 17:10, 19:22, 62:17 applied - 29:17, 29:18, 50:2 applies - 6:23, 25:4, 40:13 apply - 6:1, 6:2, 28:23, 29:9, 34:21, 40:16 appreciate - 24:17, 32:12, 61:22 approach - 27:21 appropriate - 4:2, 4:4, 4:25, 5:3, 5:4, 5:7, 15:22, 22:7, 22:11, 22:15, 57:9, 62:22 approval - 17:11, 18:3, 26:1, 36:10 approve - 8:14, 13:2, 13:3 approved - 3:1, 7:10, 30:18, 31:1 arbitrary - 13:10, 28:9, 65:23 area - 48:1 areas - 51:11, 54:25 argue - 22:3, 22:14, 26:14, 27:17, 28:24, 46:8 argued - 23:5 arguing - 60:9 argument - 10:12, 10:16 arguments - 10:8, 10:10, 22:25, 26:7, 28:8, 33:21, 60:13, 60:22, 60:24, 62:6, 58:13 arise - 9:3, 11:18 Article - 8:8 articulated - 19:9, 38:9 aspects - 54:2, 63:13 assessment - 39:10 assignment - 18:8 assistant - 24:16 associated - 69:11 assume - 10:23, 11:1 assuming - 53:18 assure - 43:9 attempt - 4:13 attention - 13:14, 61:15 Attorney - 63:3 attorneys - 24:16, 57:4, 65:21 authority - 13:3, 32:7, 57:15 authorizes - 42:22 available - 8:4, 13:24, 15:9, 17:22, 45:15, 46:22, 49:14, 59:23 aware - 5:13, 20:17 awkward - 48:15, 65:13	believes - 7:17, 6:2 benefit - 4:12, 16:21, 42:17, 64:19 best - 12:4, 12:8, 30:15, 47:4, 48:21, 48:13, 68:1 better - 12:3, 25:13, 34:18, 65:25 between - 47:3 beyond - 18:25 big - 17:12, 41:8, 49:11, 58:7 bigger - 18:11 black - 58:5 board - 19:22, 48:20, 48:15, 49:25, 50:16, 65:14 Board - 1:1, 2:9, 2:15, 2:19, 2:20, 2:21, 2:24, 3:1, 3:4, 3:9, 3:10, 3:17, 4:8, 4:23, 5:1, 6:24, 6:17, 8:21, 9:24, 10:3, 10:4, 11:10, 11:16, 14:7, 14:21, 17:2, 22:9, 22:22, 23:3, 24:18, 24:22, 25:11, 25:12, 25:18, 26:12, 27:19, 28:20, 28:5, 29:12, 29:14, 29:19, 32:19, 32:20, 32:21, 33:12, 33:24, 35:2, 36:1, 36:4, 38:4, 38:11, 38:23, 38:7, 39:21, 40:13, 40:15, 40:16, 40:20, 40:25, 41:10, 42:5, 46:17, 47:16, 48:7, 48:25, 49:5, 50:8, 50:11, 60:12, 63:13, 64:17, 65:8, 65:10, 65:19, 67:5, 67:13, 67:14, 69:2, 69:13, 69:16, 69:18, 69:21, 69:23, 69:24, 69:25, 69:26, 69:27, 69:28, 69:29, 69:30, 69:31, 69:32, 69:33, 69:34, 69:35, 69:36, 69:37, 69:38, 69:39, 69:40, 69:41, 69:42, 69:43, 69:44, 69:45, 69:46, 69:47, 69:48, 69:49, 69:50, 69:51, 69:52, 69:53, 69:54, 69:55, 69:56, 69:57, 69:58, 69:59, 69:60, 69:61, 69:62, 69:63, 69:64, 69:65, 69:66, 69:67, 69:68, 69:69, 69:70, 69:71, 69:72, 69:73, 69:74, 69:75, 69:76, 69:77, 69:78, 69:79, 69:80, 69:81, 69:82, 69:83, 69:84, 69:85, 69:86, 69:87, 69:88, 69:89, 69:90, 69:91, 69:92, 69:93, 69:94, 69:95, 69:96, 69:97, 69:98, 69:99, 69:100 Board's - 29:21, 33:6 body - 14:20, 19:11 bond - 16:5, 16:6, 16:8, 16:12, 16:15, 16:18, 16:21, 19:25, 22:15, 22:20, 31:18, 31:24, 44:13, 44:19, 45:9, 45:14, 48:10 bonding - 19:14, 46:8 bonds - 31:12, 31:13, 31:25 Bountiful - 17:7 brief - 18:15, 20:13, 30:7, 47:11, 62:2 briefing - 37:3 briefings - 38:26 briefly - 17:2, 20:7, 20:13, 25:1, 25:17 briefs - 47:12, 53:24 bring - 13:8, 64:23 brought - 40:4, 41:16, 48:21, 67:14 build - 2:12, 2:13, 23:14, 31:4 building - 34:9 built - 26:21, 26:23, 27:3, 48:18, 48:22 Bunker - 53:17, 53:25, 54:10, 54:13, 54:16, 54:18, 55:3
-----------	---	--

55:6, 55:12
burden - 18:21,
22:4
Burwell - 17:1,
17:12, 17:23, 23:6,
23:15, 23:19, 23:21,
23:24, 24:3, 24:7,
38:4, 38:11, 39:4,
39:10, 39:15, 50:9,
51:25, 52:4, 52:8
button - 64:4

C

cannot - 57:22
Canyon - 4:19,
29:16, 39:16
capacity - 18:7
capital - 15:2, 46:12
capricious - 13:11,
29:10, 65:23
carefully - 47:24,
65:19
carrying - 15:1
case - 8:4, 12:25,
13:22, 15:15, 16:18,
18:11, 25:19, 29:14,
29:18, 30:15, 30:17,
38:5, 41:26, 54:9,
58:19, 64:25
caused - 21:9, 69:8
certain - 51:8,
53:12, 55:22, 65:17
certainly - 30:3,
34:23, 40:2, 42:6,
42:13, 49:12
Certainly - 55:21
certify - 69:5, 69:11
Chair - 2:3, 2:8,
4:10, 5:2, 12:15,
24:12, 29:3, 35:2,
38:18, 39:19, 41:8,
42:16, 43:20, 46:15,
48:14, 54:23, 55:13,
57:11, 58:25, 60:24,
61:25, 63:2, 64:6,
65:11, 66:12, 66:16,
68:22, 68:25, 67:3,
67:6
Chairman - 2:5,
24:9, 35:5, 57:17
challenge - 6:13,
6:20, 7:24, 36:4
challenges - 48:6
chance - 3:20, 6:5,
49:21, 54:8, 65:4
characterization -
64:9
choice - 59:6
choices - 59:6, 64:8
chose - 50:3
Chris - 63:3
Christian - 24:15
circuit - 13:6, 36:25
Circuit - 15:17, 37:6,
43:6
circulating - 17:17
circumstances -
35:18
Citiz - 48:11
citizens - 49:21,
51:2
citizens' - 2:18,
2:17, 11:24
Citizens' - 3:3,
48:12, 58:12
City - 1:9
civil - 16:3
clarification - 35:7,
36:17, 61:23

clauses - 21:12
clean - 17:20
Clean - 6:9, 18:9,
32:3, 32:5, 32:8,
40:11, 41:5, 62:7,
62:15
clear - 6:9, 19:17,
21:17, 58:22
clear-cut - 58:22
clearly - 4:13
client - 18:11, 22:17
Club - 2:18, 2:22,
3:4, 3:8, 3:22, 4:5,
4:19, 6:10, 7:1, 8:19,
8:24, 9:1, 9:17, 9:20,
10:6, 10:13, 11:6,
11:15, 11:17, 12:10,
12:12, 14:17, 15:5,
16:13, 16:19, 19:16,
20:8, 22:3, 22:10,
25:20, 26:8, 26:11,
26:19, 27:1, 27:7,
27:10, 27:17, 28:7,
28:21, 29:15, 30:21,
31:21, 32:10, 33:4,
33:14, 33:21, 33:22,
34:11, 34:14, 34:25,
38:24, 38:23, 41:17,
46:10, 46:18, 48:9,
48:10, 48:25, 52:5,
58:20, 58:14, 60:7,
60:17, 61:18, 63:13,
63:23, 64:10, 64:17,
64:19, 66:5
Club's - 19:3, 26:17,
66:9
coal - 2:13, 17:18,
17:18, 18:13, 20:18,
21:1, 21:10, 31:4,
46:13, 48:22, 62:18
coal-fired - 2:13,
62:18
coals - 21:12
coming - 64:9
comment - 7:13,
7:18, 32:11, 33:1,
46:24, 48:22, 50:10,
57:12, 57:18
comments - 4:6,
18:18, 26:1, 32:10,
32:25, 43:23, 47:11,
48:14, 53:18, 61:23
Commission - 68:16
community - 20:24,
57:21
companies - 35:18,
44:9, 45:8, 58:18
Company - 2:13,
2:18, 2:23, 3:16, 3:22,
4:8, 12:17, 17:3, 17:4,
46:25, 59:11
company - 17:5,
23:9, 23:10, 35:23,
43:10, 47:9
compelling - 5:17
complaining - 42:6
completely - 33:6
completion - 30:18
compliance - 28:4
complicated - 40:5,
50:5
comply - 39:14
compromise - 58:1
compromised -
7:19
con - 53:20
concept - 8:2
concerns - 7:15
concluded - 68:24
conclusion - 8:15

concurrent - 60:5
Condition - 35:10,
36:18
conduct - 13:9,
33:13
confidentiality -
21:12
confusing - 34:19,
40:3, 41:2, 41:8
Congress - 8:2
consider - 19:25
considerable -
58:19
consideration -
56:6
considered - 3:4,
44:20
Considered - 66:20
consistent - 3:18,
14:3, 62:7, 62:14
Constitution - 8:7
constitution - 8:6
constrained - 65:25
construct - 18:3,
35:20, 36:5, 42:22
constructed - 44:5
constructing -
34:16
construction -
17:24, 30:25, 31:7,
34:8, 35:21, 36:25,
38:11, 43:18, 49:6
contemplated -
27:21
contested - 44:23
contact - 11:11
continue - 21:7,
45:24
contracts - 21:11,
46:13
control - 55:23,
63:6
controlled - 23:4
controlling - 23:2
controls - 16:19
convince - 14:18,
16:13, 16:19, 26:12
copy - 54:14, 66:21
correct - 29:8,
35:11, 35:12, 35:19,
45:4, 52:22, 58:24,
62:6, 68:8
correctly - 46:21,
50:1, 50:2
corresponding -
21:21
cost - 16:1, 15:4,
16:8, 16:11, 20:8,
20:21, 21:2, 21:10,
22:17
Counsel - 12:18
counsel - 4:25
County - 23:13,
26:2, 26:3, 66:10,
69:3
Couple - 48:14
couple - 18:17,
21:7, 50:14
course - 9:4, 18:2,
22:21, 32:12, 44:15,
48:17
court - 3:7, 4:12,
5:21, 12:20, 13:4,
13:8, 13:9, 14:16,
14:22, 16:19, 16:22,
19:10, 29:9, 36:25,
38:1, 40:17, 41:12,
41:15, 41:18, 41:24,
44:3, 44:15, 45:13,
50:5, 53:8, 53:13,

57:7, 58:24, 59:3,
59:5, 60:16, 66:10
Court - 4:17, 5:11,
5:12, 6:17, 13:7,
15:18, 18:17, 19:19,
19:24, 22:11, 22:14,
23:4, 27:3, 28:6,
28:12, 29:11, 30:2,
31:19, 31:22, 33:19,
33:24, 34:2, 37:8,
41:13, 42:7, 43:7,
44:11, 44:12, 44:21,
46:8, 58:21, 59:15,
61:4
courts - 5:20, 6:3,
6:6, 7:2, 7:8, 8:12,
8:18, 12:3, 12:7, 14:6,
23:3, 34:19, 34:24,
38:23, 40:6, 40:7,
40:16, 40:19, 40:24,
53:2, 60:9, 65:9
cover - 22:20, 25:17
covering - 28:16
creep - 21:7
criteria - 53:12,
53:16, 58:25, 66:6
critical - 8:10
cross - 9:6, 47:7
Car - 1:12, 69:15
current - 43:10
cut - 58:22

D

damage - 20:5,
27:8, 44:16, 61:20
damages - 20:5,
48:11
Daq - 33:12
Date - 1:10
days - 61:10, 68:10
deal - 4:8, 12:22,
22:12, 36:17, 38:20,
40:7, 45:13, 51:7
dealing - 6:19,
12:25, 24:19, 62:20,
63:12
dealt - 41:2
decide - 16:18,
34:25, 36:1, 60:8,
61:18
decided - 31:18,
60:4, 60:8, 63:16
decides - 67:16
decis - 36:14
decision - 3:8, 4:2,
7:14, 9:11, 10:1,
10:20, 10:22, 10:24,
11:1, 11:16, 12:19,
13:1, 13:6, 13:10,
13:13, 14:22, 15:10,
15:16, 15:17, 15:19,
15:22, 16:20, 23:5,
26:8, 27:4, 29:21,
29:23, 30:4, 32:17,
32:23, 33:6, 34:6,
36:17, 37:22, 38:3,
38:15, 39:7, 41:21,
42:14, 46:17, 48:17,
62:18, 60:16, 60:17,
61:24, 62:5, 62:13,
62:25, 63:9, 63:20,
65:8, 65:22, 65:24,
66:3, 67:7
decision-making -
12:19, 36:17
decisions - 3:9,
8:21, 8:22, 9:1, 9:9,
11:9, 12:21, 23:5,
32:20, 32:22, 33:17,

35:23, 48:6, 53:10,
58:22, 60:11, 64:13,
64:15, 64:18, 64:22,
65:9
declare - 58:14
defend - 42:2
defending - 51:22
deference - 29:11,
29:19, 29:23, 53:8
degree - 26:15,
58:4, 58:10
delay - 10:10,
20:15, 21:1, 31:3,
42:9, 46:5, 46:11
delayed - 34:15
delaying - 10:6,
20:9, 20:20, 21:9,
21:25, 62:12
delays - 62:24
Delta - 23:12
demonstrate -
47:18, 47:19, 53:11
demonstrated -
63:14
denial - 19:3, 22:6,
26:3, 26:10, 58:20
denials - 27:4
denied - 2:24,
10:14, 16:24, 19:16,
19:23, 23:7, 46:25,
59:25
denies - 39:22
deny - 7:1, 25:12,
26:13, 66:6, 66:17
denying - 7:2,
39:23, 41:21, 59:7,
60:13
Department - 36:14
depositions - 9:23
depth - 54:4
describe - 17:2,
23:8, 47:4, 59:6
describing - 64:7
description - 4:1,
60:22
determination -
30:14, 37:10, 37:19,
58:16, 61:6
determinations -
6:13, 26:13, 56:4
determine - 5:20,
6:4, 13:9, 37:17,
41:17, 51:16, 51:18,
57:8, 65:17
determined - 8:10,
28:20, 37:16
determines - 28:6
detrimental - 45:5
developed - 17:9
Development -
50:11
devoted - 49:12
difference - 45:8,
46:19, 47:3
different - 11:12,
39:16, 44:18, 54:2,
60:9, 60:10, 63:18,
65:22
differently - 60:8
difficult - 9:15, 14:1
direct - 9:6
director - 66:3
disagreement -
60:21
disallow - 21:14
discovery - 9:2,
9:21, 11:16, 30:23
discretion - 30:7,
47:16
discretionary -

25:11, 30:5
 discuss - 20:13,
 21:13
 discussed - 53:18,
 53:19, 54:2, 54:11
 discussing - 66:13
 discussion - 2:7,
 48:22, 50:7, 51:23,
 54:7, 54:19, 54:24,
 55:15
 discussions -
 27:20, 48:20
 dispart - 39:17
 dispute - 27:15
 dissent - 8:17
 distinct - 38:17
 distinctly - 4:14
 Divi - 28:1
 Division - 28:5,
 27:10, 27:24, 28:1,
 32:11, 32:17
 document - 37:6
 dollars - 20:22,
 21:3, 21:20, 22:16,
 58:18
 done - 14:13, 17:9,
 24:22, 26:15, 41:21,
 67:18
 down - 2:14, 18:2,
 24:20, 26:2, 31:9,
 46:1
 downwards - 21:8
 draw - 61:15
 driven - 15:9
 due - 23:1
 dunker - 15:23
 during - 13:24,
 30:8, 30:12, 32:10,
 38:19, 49:21, 51:24,
 61:10
 dust - 49:9
 duty - 5:21, 57:19

E

easily - 13:26
 easy - 6:2
 Economic - 50:11
 economic - 50:14,
 50:24, 52:19
 educating - 24:22
 effect - 27:20
 efficiency - 9:19
 effort - 67:25
 egg - 9:16
 either - 44:6, 54:22,
 63:7
 Either - 37:21
 elaborate - 39:25
 electricity - 56:1,
 57:22, 58:12
 element - 20:3
 elements - 18:22,
 25:7, 25:14, 26:15,
 25:17, 26:16, 52:11,
 61:19
 eligibility - 24:20
 eligible - 24:25
 emissions - 36:19,
 38:20, 38:11, 38:13,
 47:24, 47:25, 49:17
 emit - 27:1, 55:22
 employees - 24:3,
 24:6
 encourage - 63:19
 encouraged - 12:18
 ending - 59:2
 endorse - 57:20
 ends - 58:24
 energy - 15:6, 20:17

enforce - 51:1
 enjoins - 27:16
 ensure - 5:22, 7:12
 enter - 20:25
 entra - 41:5
 entitles - 6:25,
 39:17, 55:16, 55:22
 entitled - 18:10,
 33:9, 65:8
 entity - 23:12, 40:19
 environment -
 26:19, 56:16, 55:17,
 55:24, 57:19, 58:21,
 62:23
 environmental -
 7:15, 31:15, 52:6,
 52:22, 56:8
 environmentally -
 62:6
 envision - 57:21
 Epa - 6:11, 6:15,
 7:7, 7:17, 8:1, 23:1,
 32:2, 32:3, 32:6, 32:7,
 40:4, 40:10, 40:23
 Epa's - 6:9, 23:1
 err - 15:19
 Especially - 20:22
 essentially - 7:2,
 9:25, 19:9, 29:22,
 30:1, 30:13, 30:19,
 30:22, 31:18, 32:4,
 33:7, 38:13, 39:8,
 39:13, 39:22, 40:12,
 40:22, 41:20
 establish - 2:20,
 20:4, 22:8
 established - 7:5
 establishing -
 18:22, 19:5, 22:4,
 63:18
 event - 45:10, 69:12
 evidence - 9:7,
 13:6, 13:12, 15:19,
 15:21, 60:1
 exact - 21:11
 exactly - 51:16
 Exactly - 44:6
 examination - 9:8
 examine - 47:8
 examined - 47:24
 example - 11:13,
 31:22
 except - 34:10
 Except - 64:9
 excluded - 11:15,
 34:11
 Executive - 2:11,
 3:22, 4:7, 24:16, 26:5,
 25:18, 26:5, 27:8,
 27:9, 27:23, 28:4,
 28:9, 35:18, 42:23,
 45:3, 47:9, 48:2, 56:5,
 56:12, 56:17, 56:18,
 62:6, 62:13, 64:2
 executive - 66:3
 exhaust - 6:25,
 40:21
 exist - 48:1, 58:11
 existence - 27:17
 existing - 7:8,
 23:13, 58:2
 expected - 47:25
 expensive - 18:12
 expertise - 6:4, 8:16
 experts - 51:12
 Expires - 69:16
 explain - 5:16
 explained - 5:9
 explored - 54:25
 extensive - 4:23

26:1
 extent - 29:24
 extra - 45:5
 eyes - 26:11

F

facilitate - 66:19
 facilities - 31:1,
 31:8, 34:17
 facility - 17:16
 fact - 12:3, 18:2,
 26:17, 33:14, 42:11,
 50:16, 58:8, 62:14
 factor - 12:5, 41:7
 factored - 25:6
 factors - 5:16
 facts - 29:15, 29:16,
 29:16, 34:21, 64:22
 fail - 14:16, 22:5,
 45:10, 45:12
 failed - 14:9, 22:4
 failure - 7:21, 19:4,
 25:8
 fair - 9:17
 fairest - 20:2
 fairly - 54:24, 65:16,
 68:2
 fairness - 10:18,
 40:9
 fall - 2:11
 far - 4:4, 14:17,
 15:3, 31:10
 fatal - 25:9
 favor - 66:17
 favored - 14:6
 favors - 12:13
 fear - 27:2
 Federal - 6:16
 federal - 39:14
 few - 20:18, 21:4,
 25:2
 fifth - 10:6
 figure - 6:5
 file - 47:7, 47:12,
 47:13, 68:8, 68:12
 filed - 3:4, 3:8, 3:24,
 18:18, 28:2, 41:20,
 41:25, 61:6, 62:2,
 68:11
 filing - 18:5
 final - 28:5, 34:18,
 35:24
 finally - 4:6, 13:2
 financial - 20:24
 financing - 35:23,
 42:25
 fine - 42:7, 67:20
 finger - 64:3
 finished - 24:11
 Finlison - 12:15,
 12:16, 17:1, 17:4,
 17:14, 17:25, 18:16,
 19:14, 24:21, 42:18,
 42:19, 43:23, 44:1,
 44:5, 44:12, 61:25,
 63:12
 fired - 2:13, 62:18
 first - 4:5, 5:19,
 6:24, 18:28, 30:16,
 31:13, 37:12, 37:15,
 37:21, 42:24, 61:2
 First - 49:2
 flag - 4:15
 flip - 30:24
 fluidized - 17:17
 flux - 36:15
 focus - 30:17,
 39:13, 65:16, 66:2
 follow - 51:8

followed - 4:5,
 58:13
 force - 26:10
 forced - 22:20,
 31:21, 31:23
 foregoing - 69:5,
 69:9
 forgetting - 39:17
 form - 64:14, 65:10
 formally - 27:19
 forth - 12:23, 50:14,
 69:9
 forum - 7:25
 forums - 49:20
 forward - 8:20,
 8:23, 10:11, 11:11,
 21:25, 28:16, 30:21,
 42:12, 42:21, 45:24,
 69:8, 69:12, 60:19,
 65:2
 four - 3:20, 3:24,
 5:13, 5:17, 5:26, 14:1,
 14:2, 14:9, 16:22,
 19:7, 22:5, 22:6, 25:7,
 25:17, 30:20, 31:14,
 44:22, 53:11, 63:12,
 61:16, 61:18, 61:19,
 68:6, 68:7
 four-part - 5:13,
 5:17, 14:1, 14:9,
 30:20, 31:14, 44:22,
 61:15, 61:19
 fourth - 6:19, 12:5,
 15:12, 41:7
 frame - 61:11,
 67:19, 68:10
 Fred - 2:4, 4:19, 5:9,
 52:22, 61:14, 64:7,
 67:10
 freezes - 63:6
 front - 19:22, 66:1
 full - 11:8, 11:11,
 11:14, 12:1, 26:22,
 33:9, 33:16, 41:23,
 67:8, 66:6, 59:8
 full-party - 11:11,
 11:14, 12:1, 33:9,
 33:16
 fully - 10:7, 47:5,
 57:19
 function - 56:25

G

general - 24:18
 General's - 63:4
 generated - 21:22
 generating - 17:16
 generation - 2:13,
 22:2
 George - 18:11, 61:1
 giant - 29:25, 31:24
 given - 5:16, 6:8,
 26:17, 28:23, 34:7,
 34:15, 65:20
 global - 56:7
 goals - 50:20
 gonna - 9:1, 9:20,
 9:21, 9:22, 11:1,
 14:12, 14:17, 16:11,
 17:25, 20:7, 21:22,
 31:2, 31:3, 31:21,
 44:4, 44:10, 44:15,
 50:4, 80:24, 61:10,
 63:9, 64:1, 67:24,
 68:3
 goodness - 37:1
 governed - 12:24
 governing - 25:3
 government -

23:15, 64:3
 governmental -
 23:11, 23:18
 Grand - 4:19, 29:16,
 39:15
 grant - 2:20, 25:14,
 25:16, 26:16, 30:11,
 34:1, 37:22, 44:25,
 45:8, 47:1, 60:14
 granted - 3:1, 3:2,
 13:25, 14:6, 14:7,
 17:11, 25:20, 27:16,
 33:15, 42:23, 45:3,
 46:25, 47:15, 56:12
 granting - 16:16,
 25:3, 25:10, 44:20,
 53:7, 58:17, 62:24,
 63:5
 grapple - 6:8
 greater - 16:9
 ground - 9:10
 group - 2:16, 2:17,
 11:24
 Group - 3:3, 48:12,
 59:12
 groups - 3:21, 6:10,
 31:15, 31:24
 Grover - 36:8,
 36:15, 36:23, 37:4,
 37:7, 37:13, 37:17,
 37:25, 51:4, 52:2,
 52:5, 52:9, 53:23,
 54:3, 54:12, 54:21,
 56:2, 56:22, 62:3,
 66:16
 Grover's - 53:17
 growing - 22:1
 guarantee - 31:20
 guarded - 13:24
 guess - 25:13,
 43:10, 57:4, 57:11
 guidance - 50:4
 guidelines - 65:20,
 65:25

H

Haley - 18:11,
 18:12, 20:12, 21:15,
 23:11, 23:17, 24:8,
 24:21, 25:11, 43:19,
 43:20, 43:22, 45:16,
 61:1, 67:9
 half - 20:9, 64:6
 halt - 14:25
 hampered - 33:13
 Hand - 69:13
 handle - 3:17
 handled - 40:8
 hands - 28:11,
 66:20
 happy - 42:13
 hard - 14:12, 26:14
 hardware - 36:21
 Harm - 51:25, 52:3
 harm - 10:9, 12:9,
 12:10, 14:11, 14:12,
 15:4, 19:1, 19:8,
 20:14, 21:8, 21:17,
 22:20, 26:16, 26:18,
 26:19, 26:22, 27:2,
 30:16, 30:17, 30:19,
 30:20, 30:22, 33:4,
 34:10, 34:14, 44:8,
 51:5, 51:9, 51:18,
 51:19, 51:25, 52:1,
 52:6, 52:13, 52:15,
 52:16, 52:22, 52:25,
 58:19, 61:20
 harmed - 8:19, 11:7,

26:13, 26:15, 31:3, 58:17 harmful - 63:24 harm - 63:22, 64:1 hate - 65:25 healthy - 55:24, 57:24, 57:25 hear - 3:25, 39:24, 59:9, 59:11 heard - 2:22, 5:11, 5:24, 15:15, 15:20, 18:23 hearing - 4:14, 68:3, 68:17, 68:24 Hearing - 1:7 hearings - 28:2, 50:2, 51:15 heavily - 65:24 held - 53:21 help - 41:7 higher - 20:6, 26:15 hitting - 63:5, 64:3 hold - 18:6, 42:8, 44:10 holding - 15:11, 17:5, 64:24 holds - 32:7 hope - 38:21 hoping - 4:22 Horrocks - 39:19, 39:20, 65:11, 65:12 hour - 66:13 huge - 20:21 hundreds - 21:3, 21:19, 22:18 Huntington - 17:19 hurdle - 29:25 hurry - 37:18	Individual - 18:13 Industry - 55:15, 55:18 Inefficient - 48:5 Inflation - 21:5 Influence - 8:11, 65:3, 65:4, 65:10 Information - 26:7, 42:20, 47:13, 60:1, 60:7 Ingrained - 64:18 Initial - 39:20 Initiative - 9:8, 49:16 Injunction - 19:9 Injury - 14:18, 14:18, 19:4, 27:7 Input - 32:22, 49:22, 50:7 Instead - 17:17 Intended - 8:2 Intent - 25:25 Interact - 41:24 Interest - 21:4 Interest - 12:11, 15:7, 15:10, 21:6, 21:7, 21:23, 28:10, 31:16, 31:24 Interested - 3:21, 67:18, 69:12 Interesting - 62:2 Interfere - 27:13 Interference - 27:25 Intermountain - 16:10, 23:20, 25:24, 43:11, 63:25 Interpretation - 48:21, 48:23, 58:15 Interpreted - 50:1 Interpreter - 32:3 Interprets - 7:8 Intervene - 2:22, 2:23, 3:2, 3:6, 3:19, 59:5, 59:19 Intervention - 2:20, 47:20 Invalid - 10:24 Inventories - 48:1 Involved - 9:25, 33:14, 49:7, 62:8 Involvement - 2:8 Involving - 56:11 Ipsa - 18:12, 18:13, 20:8, 23:11, 23:19, 23:25, 61:1 Ipsalpp - 43:22 Ipp - 1:4, 2:4, 2:12, 2:24, 3:14, 3:22, 4:6, 35:7, 36:3, 36:4, 36:5, 36:17, 38:18, 47:1, 59:9, 68:9 Ipp's - 35:10 Irrelevant - 31:5 Irreparable - 14:11, 14:17, 19:1, 19:8, 26:16, 52:15, 61:20 Issuance - 29:1 Issue - 40:8 Issue - 3:12, 6:8, 8:17, 9:13, 9:19, 11:5, 12:23, 14:14, 18:5, 19:14, 22:12, 26:8, 28:17, 30:16, 30:19, 31:12, 31:13, 31:18, 33:8, 33:20, 34:4, 34:18, 34:23, 36:22, 37:10, 40:4, 41:6, 43:13, 45:13, 45:21, 45:24, 49:8, 58:14, 61:18, 61:20, 62:8	62:20, 68:1, 68:8 Issued - 2:11, 2:25, 19:2, 20:1, 26:20, 28:5, 35:14, 36:16, 38:17, 38:8, 45:22, 48:2, 55:20, 61:9 Issues - 7:13, 9:3, 9:23, 10:2, 10:4, 11:18, 11:23, 11:24, 12:6, 13:23, 16:25, 25:2, 26:4, 28:4, 28:18, 28:21, 28:22, 28:25, 39:8, 41:2, 45:2, 45:25, 48:8, 47:12, 48:20, 48:23, 49:1, 49:18, 61:7, 58:24, 59:18, 60:4, 60:10, 61:17 Issuing - 63:17 Item - 15:25 Item - 2:3 Itself - 9:5	laws - 56:13 Laying - 18:17 Least - 8:5, 21:18, 27:3, 53:24 Lee - 18:12, 20:7, 20:12, 23:20, 23:22, 24:1, 24:5 Left - 38:3 Legal - 22:23, 35:25, 45:23, 47:14, 54:7, 63:13 Legitimate - 15:9 Less - 58:11 Level - 9:10, 28:22, 45:15 Lie - 63:21 Light - 17:19 Lightly - 14:8, 14:7 Likelihood - 15:14, 45:12 Likely - 15:23, 27:18 Limited - 57:7 Limits - 52:21 Line - 16:9, 31:9 Listed - 53:5 Listening - 58:12 Literally - 21:2 Living - 57:21 Lock - 48:12 Long-term - 20:25, 46:13 Look - 15:12, 16:1, 51:5, 51:8, 51:9, 52:15, 52:16, 55:18, 59:23 Looked - 13:8, 15:14, 52:11 Looking - 21:25, 52:24, 60:8 Lost - 10:17 Low - 21:4 Lower - 19:5, 26:13 Lunge - 58:2	58:11 meant - 40:3 meantime - 34:17, 40:8, 42:5, 42:8 meet - 13:16, 14:1, 14:9, 14:15, 22:4, 28:20, 53:12, 58:25, 68:22 meeting - 47:22, 51:24, 65:15, 65:18 meetings - 48:9 meets - 28:1, 55:23, 62:17 megawatt - 17:21 megawatts - 17:15, 17:22 member - 7:20, 38:24, 50:10 members - 6:12, 6:20, 7:11, 8:5, 29:5, 35:2, 38:11, 41:10, 48:15, 50:8, 64:14, 65:14 mentioned - 19:14, 39:15, 57:20 mentions - 26:19 merely - 10:8, 29:17, 33:4, 33:13 merits - 12:6, 37:23 met - 32:14, 41:7, 53:16, 61:18, 63:14, 65:7 microphones - 4:15 might - 9:3, 13:2 Millard - 23:12, 23:13, 26:2 million - 15:1, 16:9, 17:15, 20:23, 43:9 millions - 20:22, 21:3, 21:19, 22:18, 58:18 mind - 34:22 minimal - 31:17, 44:14 minimum - 21:19 minute - 6:12, 60:8 minutes - 4:22, 54:5, 54:6, 66:14 misheard - 40:2 miss - 59:24 missed - 47:22 mission - 56:21 modified - 36:11 modifying - 61:4 moment - 20:13, 53:15 Monday - 68:11 money - 43:12 monitoring - 17:10 months - 2:10, 5:25, 14:23, 28:12, 28:20, 29:1, 48:16, 49:1, 63:15 most - 6:2, 20:3, 57:22, 58:17 motion - 3:13, 3:15, 9:2, 19:15, 19:23, 23:7, 26:17, 28:24, 39:2, 39:22, 50:8, 55:5, 58:5, 66:5, 66:8, 66:9, 66:11, 66:12, 66:16, 66:18 Motion - 2:3 motions - 2:22, 2:25, 3:4, 3:13, 3:18, 4:3, 9:3, 11:17, 47:7 Motions - 1:4, 3:5 motivation - 50:20 mountain - 17:19 moves - 21:1
Idea - 10:16, 32:18 Immunity - 23:18 Impact - 20:21, 21:18, 33:16, 38:8, 50:14, 50:18, 50:23, 63:10, 65:3 Impacts - 38:20, 50:26 Implement - 32:8 Implementation - 6:18, 32:5 Implementing - 41:5 Importance - 26:18 Important - 4:1, 27:9 Inches - 63:24 Include - 8:2 Including - 6:18, 7:14, 64:17 Including - 9:5, 61:19 Inclusive - 69:10 Increase - 21:21, 21:23 Increased - 20:19 Increasing - 22:2 Incur - 34:14, 46:11 Incurred - 20:16 Indefinite - 20:11 Independent - 32:18, 32:23, 32:24 Independently - 32:19 Index - 68:9, 68:12 Indicated - 46:7, 46:17, 53:6, 64:23, 62:3 Indicating - 62:3	Jerry - 35:4 Job - 5:18, 24:22, 28:16, 55:15, 55:16 John - 65:13 Joined - 50:11 Joins - 43:23 Jora - 4:18 Judgment - 16:7 Judicial - 6:10, 7:9, 7:21, 7:24, 8:3, 8:11, 8:12, 14:4, 16:1, 30:12, 32:16, 33:6, 40:11, 43:15, 53:6 June - 1:10, 2:1, 69:14 Jurisdiction - 5:23, 19:19, 33:23 Justice - 7:15 Justified - 14:2 Justify - 15:21	J	ma'am - 41:13 main - 65:15, 65:16 maintain - 53:8 maintenance - 46:1 major - 49:8, 49:18 majority - 48:24, 49:3, 50:3, 55:6 makers - 9:11 mandate - 27:25 Marcelle - 35:4 market - 42:24 markets - 48:12 marries - 53:5 matter - 2:10, 3:14, 3:16, 3:21, 9:9, 11:22, 12:4, 12:5, 16:3, 27:6, 32:2, 32:8, 33:23, 35:1, 35:7, 35:22, 36:3, 38:25, 44:3, 57:14, 58:23, 61:6, 61:11, 63:8, 67:10, 68:24 matters - 11:15, 34:4, 40:25, 41:3 Mayor - 57:18 mean - 6:23, 11:20, 23:16, 33:7, 33:12, 34:3, 38:10, 37:20, 48:22, 51:10, 51:22, 54:4, 56:8, 60:14, 67:21, 67:22, 68:8 meaningful - 7:12 means - 8:7, 29:11, 47:8, 59:7, 59:9	M
lack - 12:10 lacks - 13:18 laid - 37:14, 38:17 Lake - 1:9, 69:3 Lance - 18:12 land - 17:8 last - 9:12, 20:18, 20:19, 28:25, 47:22, 48:19 late - 39:8 law - 5:22, 7:6, 7:8, 12:25, 13:14, 15:15, 19:11, 29:13, 29:17, 29:22, 39:14, 51:4, 51:7, 51:15, 51:21, 52:12, 66:25	L	lack - 12:10 lacks - 13:18 laid - 37:14, 38:17 Lake - 1:9, 69:3 Lance - 18:12 land - 17:8 last - 9:12, 20:18, 20:19, 28:25, 47:22, 48:19 late - 39:8 law - 5:22, 7:6, 7:8, 12:25, 13:14, 15:15, 19:11, 29:13, 29:17, 29:22, 39:14, 51:4, 51:7, 51:15, 51:21, 52:12, 66:25		

<p>must - 6:12, 6:19, 6:25, 7:23, 24:24, 25:8</p> <p>N</p> <p>name - 17:5, 18:4, 24:14</p> <p>narrow - 65:16, 66:2</p> <p>national - 38:21</p> <p>nature - 38:6</p> <p>necessarily - 38:21</p> <p>necessary - 8:18, 26:25, 81:7</p> <p>need - 4:13, 13:16, 21:24, 22:2, 22:5, 27:5, 58:5, 58:7, 59:22, 62:16, 65:5, 66:7, 68:18</p> <p>needs - 4:24, 32:13, 35:16, 67:14</p> <p>negotiated - 33:5</p> <p>negotiations - 33:11</p> <p>Nelson - 2:4, 2:9, 4:21, 5:6, 35:12, 35:15, 36:13, 36:18, 37:2, 37:5, 38:23, 39:2, 46:24, 48:2, 48:9, 48:11, 52:24, 54:14, 54:17, 54:19, 55:2, 55:4, 55:11, 57:12, 59:4, 61:22, 67:13, 67:21, 67:24, 68:4, 68:8, 68:16, 68:20</p> <p>net - 17:15, 17:21, 44:24</p> <p>Nevco - 17:6</p> <p>never - 5:24, 58:15</p> <p>new - 9:21, 9:22, 13:8, 17:1, 34:24, 38:4, 38:23, 50:10, 65:14</p> <p>New - 9:23</p> <p>next - 61:10, 68:11</p> <p>nice - 51:20</p> <p>Non - 27:11</p> <p>non - 27:25</p> <p>Non-parties - 27:11</p> <p>non-party's - 27:25</p> <p>none - 10:10</p> <p>None - 57:25</p> <p>normally - 5:7</p> <p>North - 1:8</p> <p>Notary - 69:6</p> <p>Nothing - 61:10</p> <p>notice - 25:25, 28:2</p> <p>notion - 11:3</p> <p>numbered - 68:10</p> <p>O</p> <p>objectives - 50:20</p> <p>obligation - 13:5, 25:15</p> <p>observation - 62:2</p> <p>obtain - 7:20, 7:21</p> <p>obviously - 58:15</p> <p>occur - 12:10, 12:11, 33:4</p> <p>occure - 30:23, 33:15</p> <p>offer - 42:20</p> <p>office - 63:4</p> <p>offices - 17:6</p> <p>Official - 69:13</p> <p>Once - 20:10</p> <p>once - 9:14, 20:10, 24:10, 38:8</p>	<p>One - 66:25</p> <p>one - 5:18, 9:11, 13:7, 14:1, 16:23, 18:25, 19:13, 22:6, 25:8, 31:8, 31:9, 34:16, 47:8, 47:21, 48:11, 51:8, 52:14, 54:21, 58:20, 58:22, 58:14, 60:12, 68:24</p> <p>ones - 17:7, 49:25</p> <p>open - 29:4, 30:14</p> <p>operate - 51:8</p> <p>opinions - 34:20, 44:18, 84:14, 85:10</p> <p>opportunities - 32:13</p> <p>opportunity - 7:9, 7:12, 7:17, 8:3, 9:7, 9:17, 10:17, 24:17, 60:1</p> <p>Opposed - 66:22</p> <p>opposed - 50:11, 66:24, 66:25</p> <p>option - 13:24, 14:5</p> <p>options - 17:8, 17:9, 60:20</p> <p>oral - 3:25, 47:11</p> <p>order - 2:21, 4:4, 7:12, 14:2, 20:23, 22:6, 22:9, 22:23, 24:24, 28:5, 29:21, 30:11, 38:10, 61:4, 61:8, 61:15, 68:5, 67:11, 67:14, 67:15, 67:17</p> <p>orders - 2:25, 3:3, 26:1, 54:15</p> <p>organization - 50:17, 50:23</p> <p>otherwise - 10:11, 10:19, 68:11</p> <p>ought - 13:4, 22:18, 44:19</p> <p>ourselves - 57:21</p> <p>outlined - 27:22</p> <p>outside - 53:14</p> <p>outweigh - 27:7</p> <p>outweighs - 15:4</p> <p>overcome - 29:21, 29:25, 30:4</p> <p>overly - 63:18</p> <p>own - 7:4, 9:8, 14:3, 26:17, 34:22, 49:16, 58:10, 59:24, 59:25</p> <p>owned - 17:5</p> <p>P</p> <p>Pacificorp - 2:6, 49:16</p> <p>packet - 54:14</p> <p>packets - 38:25</p> <p>page - 37:3</p> <p>pages - 69:8</p> <p>palpable - 19:4</p> <p>paper - 22:17</p> <p>parks - 38:21</p> <p>part - 5:13, 5:17, 8:24, 14:1, 14:9, 14:13, 15:24, 16:14, 30:20, 31:14, 33:10, 36:13, 36:16, 36:24, 44:22, 46:22, 48:3, 48:4, 53:8, 61:15, 61:19, 68:3, 68:17</p> <p>Part - 2:19</p> <p>partic - 25:23</p> <p>participate - 9:17, 10:7, 11:7, 11:17, 11:20, 25:21, 45:20</p> <p>47:5, 47:8, 47:19</p> <p>participated - 25:23</p> <p>participating - 63:16, 65:6</p> <p>participation - 10:14, 47:15, 67:8</p> <p>particular - 9:13, 20:18, 58:11, 57:14, 58:10</p> <p>Particularly - 32:6</p> <p>particularly - 11:22, 29:14, 34:7, 34:15</p> <p>parties - 2:21, 6:24, 8:22, 10:11, 16:21, 24:21, 25:7, 26:22, 27:11, 27:14, 27:18, 27:21, 28:10, 28:11, 28:15, 29:6, 31:2, 34:8, 35:3, 47:9, 51:25, 52:3, 52:28, 53:1, 57:7, 60:9, 64:23, 64:25, 68:11</p> <p>Partnership - 49:8</p> <p>parts - 6:18, 14:2</p> <p>party - 5:15, 10:16, 11:8, 11:11, 11:14, 12:1, 13:18, 13:22, 18:21, 19:1, 25:22, 27:10, 28:7, 33:9, 33:16, 47:3, 47:5, 47:17, 54:8, 58:16, 60:2, 60:18, 84:11, 85:6</p> <p>party's - 27:26</p> <p>past - 21:2, 21:4, 21:7, 42:24</p> <p>pause - 63:5, 64:4</p> <p>pay - 13:13</p> <p>pedestrian - 63:4</p> <p>pendency - 30:6, 30:12</p> <p>pending - 38:4, 37:9, 61:4</p> <p>people - 5:2, 65:15</p> <p>per - 20:20</p> <p>percent - 20:20</p> <p>perform - 27:24</p> <p>perhaps - 51:13</p> <p>period - 20:11, 32:11, 33:1, 48:22, 57:7</p> <p>permit - 2:11, 2:12, 2:18, 6:15, 7:10, 7:11, 8:3, 8:4, 13:19, 18:1, 18:2, 18:3, 18:4, 18:10, 28:4, 30:19, 35:8, 35:13, 35:15, 35:17, 35:20, 35:24, 36:1, 36:2, 36:5, 36:6, 36:12, 42:22, 43:1, 43:2, 43:5, 43:8, 43:13, 43:17, 45:3, 45:4, 58:11, 57:8, 58:10, 62:11, 62:21</p> <p>permits - 2:15, 2:17, 6:19, 6:21, 8:17, 25:25, 26:6, 26:20, 31:1, 38:15, 40:12, 41:4, 55:20</p> <p>permitted - 27:12</p> <p>permitting - 7:14, 7:22, 7:24, 39:12, 47:23, 48:3, 62:18</p> <p>person - 16:8</p> <p>personally - 50:4</p> <p>persons - 7:23</p> <p>perspective - 13:17, 25:4, 25:18, 40:9, 45:17, 48:6, 84:1</p> <p>petition - 3:2, 5:11, 16:24, 41:20, 58:17, 59:18</p> <p>petitioned - 23:14</p> <p>petitioning - 51:20</p> <p>petitions - 3:6, 3:8</p> <p>place - 22:18, 22:17, 42:20</p> <p>place - 44:26, 63:11, 53:16</p> <p>places - 18:20</p> <p>placing - 33:24</p> <p>plans - 6:18</p> <p>plant - 2:14, 24:5, 38:18, 38:19, 42:21, 44:4, 44:7, 48:22, 49:5, 62:18, 68:10</p> <p>plants - 17:18, 26:20, 26:22, 26:25, 27:2, 38:6, 38:7, 39:11, 47:25, 48:17, 48:18, 49:14, 49:16, 49:17, 50:15</p> <p>play - 18:19</p> <p>pleadings - 3:19, 3:20, 3:24, 4:23, 38:22</p> <p>plenty - 42:13</p> <p>plugged - 19:11</p> <p>Pre - 1:11, 2:1, 68:24</p> <p>point - 4:9, 19:4, 19:7, 19:20, 21:16, 22:10, 25:1, 27:9, 32:15, 35:16, 37:2, 40:22, 41:1, 48:1, 59:14, 59:17, 59:21, 63:11, 64:10</p> <p>pointed - 11:9</p> <p>pointing - 25:10, 26:10</p> <p>points - 4:1, 22:5, 22:8, 38:18, 64:8</p> <p>political - 23:22</p> <p>pollutants - 27:1, 58:9</p> <p>pollution - 65:22</p> <p>position - 12:3, 12:4, 12:8, 23:1, 42:2, 51:23, 52:10</p> <p>positioned - 34:20</p> <p>positions - 53:1</p> <p>possible - 57:9, 57:10, 58:1</p> <p>possibly - 20:24, 28:12, 32:16</p> <p>post - 22:20, 31:16, 31:23, 31:25, 48:10</p> <p>potential - 20:14, 20:21</p> <p>potentially - 36:21, 64:23</p> <p>power - 2:13, 5:21, 17:18, 21:22, 21:24, 22:2, 24:5, 38:6, 38:7, 44:4, 44:7, 44:9, 45:5, 46:18, 49:5, 49:15, 50:14, 58:6, 58:7, 58:18, 68:10</p> <p>Power - 1:4, 2:4, 2:13, 2:18, 2:23, 3:18, 3:22, 4:8, 12:17, 16:10, 17:2, 17:4, 17:19, 23:20, 25:19, 25:20, 25:24, 43:11, 46:25, 48:17, 59:11, 63:25</p> <p>practical - 35:22, 45:18, 61:6, 61:11, 68:2</p> <p>practices - 9:2</p>	<p>precedence - 60:10</p> <p>precedent - 60:3</p> <p>precipitated - 54:23</p> <p>precisely - 19:20</p> <p>precluded - 30:10</p> <p>predated - 49:15</p> <p>prefer - 61:17</p> <p>prej - 64:12</p> <p>prejudice - 10:20, 34:15</p> <p>prejudiced - 8:25, 35:1, 42:11</p> <p>prejudicial - 64:12</p> <p>preliminary - 19:9</p> <p>premise - 10:22, 10:23</p> <p>preparation - 8:4, 9:5, 11:19, 11:21</p> <p>present - 9:7, 47:6, 47:7, 47:10, 59:24, 60:1, 64:20, 65:15</p> <p>presentation - 38:21, 44:18</p> <p>presented - 10:12, 13:12, 38:5, 47:12, 48:5, 50:2, 64:16</p> <p>presenting - 28:21, 60:7</p> <p>presently - 43:3</p> <p>presents - 12:6, 28:17</p> <p>preserved - 10:18</p> <p>presumably - 26:25, 34:9</p> <p>presupposing - 56:3</p> <p>pretrial - 9:4, 11:19</p> <p>pretty - 13:15, 13:23, 18:3, 16:12, 17:20, 45:11</p> <p>prevail - 15:24, 16:18</p> <p>prevails - 69:15</p> <p>prevent - 58:20</p> <p>prevented - 34:16</p> <p>prevents - 16:14, 59:2</p> <p>previous - 38:24, 48:17</p> <p>price - 20:17, 20:19, 21:1, 21:12, 21:22, 21:24, 22:17</p> <p>private - 23:24</p> <p>pro - 53:20</p> <p>problem - 45:19</p> <p>procedural - 62:8, 67:17</p> <p>procedurally - 57:10</p> <p>Procedure - 19:11, 19:21</p> <p>procedure - 11:10, 44:18</p> <p>Procedures - 40:18</p> <p>procedures - 16:4</p> <p>proceed - 2:21, 4:2, 11:2, 20:3, 48:7</p> <p>proceeding - 2:23, 2:24, 6:5, 6:14, 7:1, 8:20, 8:23, 9:14, 9:18, 9:20, 10:7, 10:14, 12:12, 30:21, 31:8, 32:4, 32:15, 32:24, 33:18, 34:4, 34:5, 34:12, 40:17, 44:9, 45:1, 47:1, 47:2, 53:2, 59:13, 59:17</p> <p>Proceedings - 1:7</p> <p>proceedings - 3:5, 3:11, 3:14, 3:15, 5:10,</p>
--	---	---

<p>5:18, 6:11, 10:19, 12:14, 27:11, 28:8, 28:11, 37:9, 42:9, 42:12, 47:8, 48:5, 57:8, 59:8, 60:5, 60:15, 60:18, 60:19, 63:15, 69:5, 69:7, 69:9</p> <p>process - 5:7, 10:6, 10:10, 11:11, 12:20, 13:20, 13:25, 14:19, 15:9, 16:4, 18:13, 16:17, 17:18, 17:20, 27:22, 36:17, 37:14, 41:24, 43:3, 43:4, 43:14, 43:15, 43:17, 44:11, 44:17, 44:22, 47:18, 47:23, 48:3, 48:4, 53:8, 57:5, 59:24, 60:12, 60:14, 61:24, 62:20, 64:11, 64:24, 65:2, 67:11</p> <p>processes - 8:11, 59:20</p> <p>procurement - 18:14</p> <p>production - 17:21</p> <p>Professional - 69:8</p> <p>project - 14:18, 15:1, 15:2, 16:9, 17:8, 17:12, 17:15, 18:8, 19:7, 20:15, 20:20, 20:21, 21:9, 21:20, 21:23, 30:18, 42:25, 50:25</p> <p>Project - 16:10, 43:11</p> <p>projects - 50:18, 50:24</p> <p>proposals - 31:10</p> <p>proposed - 7:16, 8:10</p> <p>protect - 16:6, 18:21, 27:23, 55:15, 55:16, 55:17, 57:19</p> <p>protecting - 58:21, 62:22</p> <p>protection - 16:14, 44:13, 45:9, 45:14</p> <p>prove - 19:4, 21:11</p> <p>proven - 49:19</p> <p>provide - 6:19, 30:7, 49:22, 62:15</p> <p>provided - 7:18, 32:11, 38:13, 38:22</p> <p>provision - 30:8, 35:5, 59:10</p> <p>provisions - 36:2</p> <p>prudent - 6:3</p> <p>Psalm - 6:13, 6:15, 6:19, 7:10, 7:22, 7:24, 8:3, 40:11</p> <p>Public - 69:8</p> <p>public - 6:12, 6:20, 7:11, 7:13, 7:16, 7:20, 8:5, 8:11, 9:25, 10:3, 10:5, 11:20, 12:11, 14:14, 15:7, 15:10, 21:23, 28:10, 28:18, 28:22, 31:15, 31:24, 32:22, 33:1, 49:6, 49:18, 49:21, 52:9</p> <p>public's - 15:7</p> <p>pulverized - 17:18</p> <p>pursuing - 58:20</p> <p>put - 10:10, 16:5, 16:12, 16:18, 17:7, 29:16, 42:25, 44:25, 50:14, 53:15</p>	<p>Q</p> <p>Quality - 1:1, 14:21, 27:10, 28:1, 32:12, 32:17, 32:20, 32:21, 38:14, 50:12, 56:19</p> <p>quality - 38:8, 49:11, 50:13, 50:18, 50:23, 51:2, 51:5, 51:7, 51:13, 62:16, 52:18</p> <p>Quality's - 27:24</p> <p>quest - 23:11, 23:15</p> <p>quasi-government - 23:15</p> <p>quasi- governmental - 23:11</p> <p>questions - 4:8, 24:10, 29:5, 34:22, 35:3, 40:7, 42:16, 50:5, 50:17, 50:19, 55:1, 55:22</p> <p>questions/ comments - 41:9</p> <p>quick - 20:14, 43:26</p> <p>quite - 20:24</p> <p>quo - 53:9, 53:14</p> <p>quoted - 30:7</p> <p>quoting - 40:10</p> <p>R</p> <p>R307-103-10 - 18:20</p> <p>raise - 12:5, 56:24, 59:17</p> <p>raised - 11:23, 26:5, 28:8, 28:9, 39:9, 45:2, 48:24, 50:17, 56:14, 59:18</p> <p>raises - 40:8, 50:19</p> <p>ran - 13:13</p> <p>rapidly - 22:1</p> <p>rates - 21:4, 21:6, 21:7</p> <p>Rathbun - 24:15</p> <p>Rather - 10:5</p> <p>rather - 58:4</p> <p>rationale - 54:20</p> <p>re - 40:24, 59:23</p> <p>Re - 1:3</p> <p>re-look - 58:23</p> <p>reach - 45:19</p> <p>read - 30:8</p> <p>ready - 86:14</p> <p>real - 21:8, 34:10</p> <p>realize - 6:3, 34:23</p> <p>realized - 6:1</p> <p>really - 13:9, 14:5, 18:6, 19:18, 21:18, 22:4, 24:19, 34:14, 38:20, 41:3, 44:8, 44:10, 51:6, 56:7, 58:17, 59:4, 60:20, 61:21, 62:20, 65:2</p> <p>reason - 5:17, 6:7, 7:3, 19:2, 19:15, 53:4</p> <p>reasons - 40:14</p> <p>rebuttal - 4:20, 5:5, 29:4, 42:20</p> <p>receive - 18:10</p> <p>recently - 6:16</p> <p>record - 13:7, 30:3, 43:19, 43:22, 47:13, 68:3, 68:9, 68:12, 68:18</p> <p>recuse - 2:6</p> <p>recused - 67:4</p> <p>redoing - 12:12</p>	<p>redone - 10:2</p> <p>redress - 19:24</p> <p>reduce - 48:17</p> <p>referenced - 6:16</p> <p>reflect - 44:16, 63:20</p> <p>reflects - 41:4</p> <p>refused - 8:13, 6:14</p> <p>regard - 36:18</p> <p>regard - 51:3, 53:17</p> <p>regardless - 44:2</p> <p>Regional - 49:8</p> <p>Registrar - 6:16</p> <p>Registered - 69:5</p> <p>regulate - 55:17</p> <p>regulations - 7:8, 7:16, 55:18, 57:23</p> <p>regulatory - 14:19, 18:7, 27:25, 58:8</p> <p>rehashing - 10:4</p> <p>related - 27:6</p> <p>relative - 21:17, 35:10, 40:24, 53:1, 63:22</p> <p>relevant - 5:14</p> <p>rely - 4:25</p> <p>Rely - 5:2</p> <p>remaining - 45:25</p> <p>remedies - 6:25, 40:21</p> <p>remedy - 19:17, 30:8, 30:12, 61:11</p> <p>remember - 6:22, 13:17, 37:15</p> <p>remind - 2:9</p> <p>remote - 63:5</p> <p>remove - 33:23</p> <p>renewable - 15:8</p> <p>repeat - 18:18</p> <p>repeated - 4:16</p> <p>reported - 69:7</p> <p>Reported - 1:12</p> <p>reporter - 4:17</p> <p>Reporter - 4:17</p> <p>41:13, 58:21, 68:6</p> <p>represent - 18:12, 24:16, 38:18, 54:5, 57:24</p> <p>representing - 4:18, 12:17, 23:9, 65:22</p> <p>represents - 58:1</p> <p>request - 10:16, 14:8, 25:9, 28:3, 28:17, 38:1, 38:16, 58:11, 68:17, 68:5, 68:16</p> <p>requested - 35:9</p> <p>requesting - 14:20</p> <p>require - 7:8, 12:22, 13:18, 20:25, 47:14</p> <p>required - 2:20, 31:18, 40:20, 43:12, 51:15, 51:21, 52:12, 56:25</p> <p>requirement - 40:15, 68:22</p> <p>requirements - 6:6, 18:9, 24:23, 24:24, 47:20, 53:5, 53:13, 55:19, 55:24, 62:14, 62:18, 63:14</p> <p>requires - 6:9, 25:8, 40:9, 40:11, 51:4, 64:24</p> <p>reserve - 4:20</p> <p>resolution - 27:14, 45:20</p> <p>resolve - 28:3, 45:25</p> <p>resolved - 18:6</p>	<p>43:13</p> <p>resolving - 33:8</p> <p>resources - 49:13, 64:3</p> <p>respect - 2:25, 23:2, 25:2, 35:7, 47:13, 52:25, 60:4</p> <p>respond - 61:2</p> <p>responsibility - 13:1, 14:25, 50:13, 51:1</p> <p>responsible - 18:13</p> <p>rest - 45:1</p> <p>result - 36:9, 44:24, 48:11, 52:19, 58:17</p> <p>retaken - 10:2</p> <p>retrofit - 49:14</p> <p>reused - 10:1</p> <p>review - 3:11, 3:20, 7:9, 7:13, 7:18, 7:21, 8:3, 8:11, 8:13, 13:6, 13:9, 13:18, 13:20, 29:8, 29:10, 29:19, 30:13, 32:16, 32:18, 32:20, 32:23, 32:24, 33:8, 40:11, 41:20, 42:14, 43:3, 43:14, 43:18, 50:1, 54:4, 58:19, 57:1, 62:11, 62:12, 62:25</p> <p>reviewed - 3:9, 13:4, 55:13</p> <p>reviewing - 45:1, 58:7, 58:9, 58:10</p> <p>Richard - 24:15</p> <p>rigid - 55:19</p> <p>rise - 28:22</p> <p>rising - 26:16</p> <p>road - 18:2, 45:1</p> <p>rounded - 64:21</p> <p>routinely - 28:1</p> <p>Rpr - 1:12, 69:15</p> <p>rule - 5:14, 7:9, 10:25, 18:3, 18:17, 18:19, 19:8, 19:20, 24:23, 25:2, 25:6, 25:7, 25:12, 25:18, 28:16, 30:13</p> <p>Rule - 16:4, 19:21</p> <p>ruled - 55:7</p> <p>Rules - 19:11, 19:12, 19:21</p> <p>rules - 2:19, 5:15, 7:5, 7:22, 12:22, 12:23, 14:3, 27:22, 28:13, 56:4, 57:23</p> <p>ruling - 15:20</p> <p>run - 14:23</p> <p>S</p> <p>sale - 17:22</p> <p>Salt - 1:9, 69:3</p> <p>Samuelson - 52:3, 57:17, 59:1</p> <p>sat - 51:14</p> <p>satisfied - 24:24, 25:8, 25:14, 25:16</p> <p>satisfy - 8:5, 25:8, 56:7</p> <p>schedule - 9:22</p> <p>scheduled - 17:23</p> <p>scheduling - 11:15, 30:23</p> <p>scheme - 56:6</p> <p>scope - 7:14</p> <p>Seal - 69:13</p> <p>seat - 62:9</p> <p>second - 3:14, 6:7, 40:17, 66:11, 66:13</p>	<p>secondly - 31:14</p> <p>Secondly - 27:8</p> <p>Secretary - 2:11, 3:23, 4:7, 17:11, 24:17, 25:5, 25:18, 26:5, 27:8, 27:9, 27:23, 28:5, 28:9, 35:18, 42:23, 45:3, 47:9, 48:2, 58:5, 58:12, 58:17, 58:19, 62:6, 62:14, 64:2</p> <p>see - 43:16, 62:13, 62:17</p> <p>seek - 19:17, 19:23, 27:14, 31:15, 42:13</p> <p>seeking - 18:21, 19:1, 33:6</p> <p>seem - 28:23</p> <p>Seghini - 41:11, 41:15, 41:23, 42:2, 42:15, 46:14, 46:18, 47:21, 48:8, 48:10, 48:13, 55:14, 57:2</p> <p>Seghini's - 57:18</p> <p>send - 67:16</p> <p>sense - 10:15</p> <p>sensible - 20:3</p> <p>sent - 38:24</p> <p>serious - 12:5, 28:25</p> <p>seriously - 7:19</p> <p>servants - 9:25</p> <p>served - 10:3, 10:5</p> <p>set - 4:24, 12:23, 23:17, 53:4, 68:10, 69:9</p> <p>sets - 16:4</p> <p>settlement - 27:20, 33:3, 33:5, 33:7, 33:10</p> <p>settlements - 33:13</p> <p>Several - 2:10</p> <p>several - 48:15</p> <p>Sewer - 1:4, 2:4, 2:12, 2:18, 2:23, 3:2, 3:16, 3:22, 4:5, 12:17, 17:2, 17:4, 25:19, 25:24, 28:3, 48:25, 48:11, 59:11, 59:12, 63:26, 66:10</p> <p>shareholder - 24:2</p> <p>shareholders - 23:25, 24:2</p> <p>Shoop - 24:9, 24:13, 35:5, 35:13, 43:25, 44:8, 57:3, 61:3</p> <p>short - 3:25, 4:21</p> <p>show - 33:12</p> <p>show - 15:13, 29:22</p> <p>shows - 41:1</p> <p>shutdown - 36:20</p> <p>side - 23:14, 30:24, 58:14, 63:7, 64:17</p> <p>sides - 64:17</p> <p>Sierr - 46:9</p> <p>Sierra - 2:16, 2:22, 3:4, 3:8, 3:21, 4:5, 4:19, 6:10, 7:1, 8:19, 8:24, 9:1, 9:17, 9:20, 10:6, 10:13, 11:6, 11:14, 11:16, 12:10, 12:12, 14:17, 15:4, 16:13, 16:18, 18:3, 19:16, 20:6, 22:3, 22:10, 25:20, 26:8, 28:11, 28:17, 28:18, 27:1, 27:7, 27:10, 27:17, 28:7, 28:21, 29:15, 30:20, 31:21, 32:10, 33:4, 33:14,</p>
--	--	--	--	--

33:21, 33:22, 34:11,
34:14, 34:25, 36:24,
39:23, 41:16, 46:10,
46:18, 48:9, 48:10,
48:25, 52:5, 58:20,
59:14, 60:7, 60:17,
61:18, 63:13, 63:23,
64:10, 64:17, 64:19,
65:5, 66:9
signed - 49:4,
67:12, 67:16
significant - 15:3,
28:22
significantly - 8:20
Sigurd - 2:14
simple - 58:16,
67:14
simply - 45:15,
61:23
Slip - 7:22, 8:10,
8:14
Slips - 7:10
slit - 28:11
sitting - 15:2
situation - 25:4,
40:5, 40:12
situations - 6:23
skimming -
62:12, 62:23
slam - 15:23
small - 31:25, 44:15
society - 55:23,
55:25
someone - 49:7
somewhat - 85:13
somewhere - 31:9
Soon - 67:21
soon - 25:23, 27:3,
67:12, 67:19, 67:22
sorry - 7:10, 8:13,
8:14, 11:20, 41:13,
58:21
Sorry - 41:8
sort - 30:4, 30:23,
33:17
sorts - 8:21, 8:22,
64:13
sounds - 58:23
source - 7:16
sources - 28:2,
49:10, 55:21
Spc - 11:22, 38:19
Speaker - 66:20,
66:24, 67:2, 67:5
speaking - 43:9
specific - 38:18,
58:25
specifically - 38:19,
52:11
specifics - 56:10
specified - 51:16
spend - 20:12,
49:19
split - 55:2, 55:4
squarely - 34:3
ss - 59:3
Sa - 45:20
staff - 49:24, 50:1
stage - 25:25
standard - 13:15,
15:12, 18:17, 19:5,
19:9, 28:14, 29:8,
29:10, 29:18, 29:20,
40:13, 40:17, 47:14,
53:4, 61:24
standards - 7:4,
7:5, 19:8, 47:24,
52:14, 57:23, 63:17,
63:18
standing - 2:21,

5:20, 5:25, 8:4, 8:6,
10:13, 11:2, 12:21,
12:23, 12:24, 12:25,
13:18, 13:19, 13:23,
14:6, 14:22, 15:18,
19:3, 19:5, 22:24,
26:13, 27:4, 28:13,
28:19, 29:13, 30:17,
33:20, 34:19, 37:10,
40:14, 40:23, 40:24,
41:17, 41:21, 42:3,
42:11, 43:7, 45:23,
46:18, 46:21, 46:23,
48:25, 47:18, 48:25,
50:5, 50:19, 51:17,
56:24, 63:19, 63:21,
65:18
standpoint - 36:25,
50:16, 52:19
start - 8:21, 12:17,
17:25, 34:9, 35:19,
38:19, 62:5, 62:10,
64:14, 64:18, 65:9,
65:12
started - 38:11
starting - 30:2
startup - 38:19
startup/shutdown -
46:1
startup/shutdown/
maintenance - 45:21
State - 5:12, 8:18,
23:3, 23:17, 23:23,
32:5, 68:2, 68:6
state - 7:2, 7:9,
7:21, 8:3, 8:12, 14:18,
16:13, 39:14, 51:2
statement - 6:15,
6:23, 8:1, 39:21, 49:4,
65:13
States - 6:17, 8:7
states - 6:17
stationary - 40:10,
55:21
status - 2:10, 11:12,
11:13, 11:14, 11:25,
12:1, 25:21, 33:9,
33:16, 35:8, 47:4,
47:10, 47:17, 48:4,
63:9, 53:14
statute - 7:18, 30:10
stay - 3:5, 3:10,
3:14, 3:15, 4:3, 5:16,
6:4, 10:13, 10:16,
11:3, 12:13, 14:8,
16:2, 16:20, 18:24,
18:21, 19:1, 19:2,
19:15, 19:17, 19:23,
21:17, 22:13, 24:25,
25:3, 25:9, 25:10,
25:14, 25:16, 26:16,
26:24, 27:5, 27:12,
27:16, 27:18, 28:24,
29:1, 30:5, 30:11,
30:25, 31:5, 31:6,
31:7, 31:21, 34:1,
34:8, 35:9, 35:10,
35:21, 35:23, 35:25,
37:9, 37:23, 37:24,
38:5, 39:3, 39:22,
40:8, 44:20, 44:24,
45:8, 45:21, 46:1,
46:2, 52:25, 53:7,
53:11, 53:15, 57:8,
57:8, 58:17, 58:20,
59:7, 60:13, 60:14,
61:5, 61:8, 61:16,
62:24, 63:5, 63:17,
63:24, 64:1, 66:5,
66:9, 66:17

Stay - 1:4, 2:4, 14:5
stayed - 5:10, 44:9
staying - 10:18,
13:23, 52:17, 53:2
stays - 31:16
Stead - 35:4
stenotype - 69:7
step - 53:13
Stephens - 24:14,
24:15, 63:2, 63:3
still - 16:3, 34:22,
44:22
stop - 13:20, 14:21,
16:13, 45:22, 46:2
stops - 16:20, 44:25
straight - 28:18,
37:23, 40:19
strange - 28:23
strong - 10:8
strongly - 22:22
struck - 67:18,
68:13
stuck - 64:4
subdivision - 23:22
subject - 12:7, 43:3,
46:23
submit - 14:9,
14:14, 15:20, 18:24,
19:15, 23:8, 45:11,
62:1
submits - 28:9
submitted - 15:21,
16:25, 17:10, 26:1,
26:7, 32:10, 45:7,
62:5
submitting - 62:23
substantial - 15:13,
49:13
successful - 9:20,
12:13, 39:9
sudden - 28:25
suffer - 19:1, 30:21,
33:5
sufficient - 8:11
sug - 33:11
suggest - 5:16,
10:9, 10:11, 13:3,
26:18, 34:1, 40:5,
64:10
suggested - 14:12,
44:14, 64:12
suggestion - 3:17,
3:25, 14:8, 29:8,
29:24, 31:2, 31:23,
32:1, 32:9, 33:3,
33:11, 33:20
suggests - 12:5,
41:6
sum - 12:2
supercilious - 16:5,
16:14
supplement - 68:13
support - 15:20
supported - 13:11
supposed - 12:24,
32:18, 32:24, 49:25,
51:16
Supreme - 6:17,
23:4
system - 14:4,
14:13, 16:2, 16:19,
16:22
systems - 44:3

T

table - 62:9, 64:25
technical - 16:4
technology - 17:17,
48:22, 49:14, 58:2

temporary - 30:12
tendency - 58:13
tens - 20:22, 21:18,
22:17, 58:18
term - 20:25, 46:13
termi - 37:9
terms - 18:17, 20:6,
21:16, 25:8, 35:8,
41:12, 41:15, 41:24,
42:24, 45:19, 55:14,
61:3, 61:13
test - 5:14, 5:17,
14:1, 14:10, 28:19,
28:24, 30:20, 31:14,
44:20, 61:15, 61:19
testimony - 9:7,
15:15, 47:7, 58:25
tests - 44:21
thereafter - 69:8
therefore - 8:2,
8:13, 11:2, 11:6,
11:25, 34:5, 66:8
Therefore - 28:20,
32:8
thereof - 68:12
they've - 66:7
They've - 17:8,
19:10, 19:18, 61:7
thick - 62:3
third - 10:20, 15:25,
23:14
Third - 8:19
threat - 27:7
three - 5:25, 53:24
threshold - 8:6,
63:14
throughout - 5:23
today - 3:12, 30:19,
45:8, 63:9, 65:14
Today - 66:1
today's - 42:23,
68:3
together - 17:7
token - 33:25
tolerate - 58:2
tomorrow - 34:9,
35:20
tone - 20:23
tough - 13:15
towards - 33:7
transcribed - 69:6,
69:9
Transcript - 1:7
transcript - 68:2,
68:9, 68:17
transcription - 69:9
trial - 9:5, 9:6, 9:8,
11:21
trouble - 4:14
true - 28:7, 30:5,
32:2, 32:4, 44:16,
69:8
Trust - 4:19, 29:16,
39:16
try - 45:24
trying - 6:1, 14:24,
33:23, 34:21, 40:16,
40:22, 45:19, 54:5
turn - 12:19
turning - 33:21
turns - 42:10
Two - 63:15
two - 3:13, 5:10,
6:22, 20:9, 20:19,
23:13, 28:20, 29:1,
37:3, 39:11, 39:16,
40:14, 41:4, 47:25,
48:16, 48:1, 50:18,
53:24, 58:6, 59:20,
60:20, 61:16, 64:8

two-page - 37:3
type - 38:7
types - 9:1
typewriting - 69:8
typically - 31:14,
31:16
Typically - 31:24

U

Uh-oh - 60:23
ultimately - 8:5,
11:19, 32:16, 36:8
unable - 7:20
unanimous - 54:22,
54:24
uncomfortable -
49:2
under - 5:17, 7:6,
7:10, 8:6, 30:20,
35:20, 40:18
undermining -
10:25, 11:3
underscores - 33:4,
33:14
undertake - 8:22
unfairly - 10:19
unhealthy - 58:9
uniform - 5:22
Unit - 2:12
unit - 23:14
United - 6:17, 8:7
units - 23:13
Unknown - 66:20,
66:24, 67:2, 67:5
Unless - 30:10
unless - 19:2, 63:11
unscramble - 9:16
unsuccessful -
22:21
up - 4:11, 4:25,
10:2, 12:2, 14:23,
16:5, 16:12, 16:18,
18:9, 20:18, 21:1,
23:17, 28:14, 40:4,
41:14, 42:9, 42:25,
43:12, 48:21, 53:6,
56:22, 58:24, 59:2,
66:20, 67:16, 68:5
Up - 32:21
upgrading - 49:15
upset - 36:20
upwards - 21:8
urge - 18:23, 44:18
uses - 17:18
Utah - 1:1, 1:9, 5:20,
6:22, 7:6, 8:16, 12:25,
13:14, 17:18, 17:19,
23:3, 23:4, 23:12,
23:18, 23:23, 40:12,
41:5, 44:3, 69:2, 69:6,
69:13
Utah's - 32:5, 32:7

V

vacuum - 51:6,
53:21
valid - 30:1, 43:1,
43:2, 43:5, 45:4
validity - 36:2
value - 60:3
various - 24:23,
65:21
vehicles - 49:10
Veranth - 58:14,
67:16
veto - 27:20
view - 23:2
viewpoints - 25:4

violation - 26:3 Virginia - 8:10 Virginia's - 8:9, 8:13, 8:14 visibility - 38:20 voice - 54:22, 55:8, 55:10 vote - 48:24, 49:3, 50:3, 55:4, 66:14, 66:18, 67:2, 67:3 voting - 66:23, 67:1	years - 20:9, 20:16, 20:19, 21:5, 21:7, 48:19
W	
wait - 8:12, 48:3, 50:5, 60:15, 65:7 waiting - 10:9, 38:3 Walker - 4:10, 4:18, 5:4, 5:8, 22:25, 24:21, 28:7, 35:19, 37:11, 37:14, 37:20, 38:2, 38:10, 38:12, 39:1, 39:6, 39:12, 39:18, 39:20, 40:1, 41:19, 42:1, 42:4, 63:2, 64:6, 64:7, 67:10, 67:19, 67:22, 68:1, 68:7, 68:14, 68:16, 68:23 wanda - 8:11, 27:23, 57:13 warrant - 29:1 water - 17:9, 66:15 week - 67:23 welch - 63:20 weighed - 65:19, 65:23 weighing - 20:5, 21:16, 61:16, 66:2, 66:4 welcome - 50:4 well-rounded - 64:21 Wesman - 2:5, 67:3, 67:4 west - 22:1 West - 1:8, 49:11 Western - 49:7 whatnot - 40:4 white - 58:5 whole - 10:16, 10:22, 31:17, 32:4, 32:15, 40:4 wholly - 22:4 wide - 30:14 Wilburn - 1:12, 69:5, 69:15 win - 15:14 wise - 64:2 Witness - 62:1, 69:13 witnesses - 9:6, 47:7, 59:24 won - 16:6 word - 4:21 words - 9:14, 10:25, 64:21, 65:1 works - 63:7, 63:8 world - 57:21 worth - 15:2, 25:9, 28:10 wrap - 28:14 Wrap - 49:12, 49:20 written - 5:14 wrote - 34:20	
Y	
year - 20:9, 20:20, 20:23, 64:4 year's - 15:2	

TBA

~~2 MEMOS~~

~~DAQC 1089-2005~~

~~DAQH 0538-05~~

4/13/2005
minutes



State of Utah

Department of
Environmental Quality

Dianne R. Nielson, Ph.D.
Executive Director

DIVISION OF AIR QUALITY
Richard W. Sprott
Director

JON M. HUNTSMAN, JR.
Governor

GARY HERBERT
Lieutenant Governor

DAQ-032-2005

MEMORANDUM

TO: Air Quality Board

FROM: Jan Miller

THROUGH: Rick Sprott

DATE: May 24, 2005

SUBJECT: Propose for Public Comment: Amend R307-150 to Add Requirement to Report Emissions of Tertiary Butyl Acetate

At the April meeting, the Board proposed for public comment a change in the definition of volatile organic compounds (VOCs). The change, if approved, will incorporate by reference the revisions made by EPA in the federal definition of VOCs, deleting five compounds. One of those compounds is t-butyl acetate, known as TBAC or TBAc.

At that time, there was discussion of what to do with the new federal requirement that TBAC emissions be reported to DAQ even though it is no longer a VOC. The Board asked that staff draft a rule for Board consideration that would incorporate the new federal inventory requirement. The Board was concerned that, because sources are subject to the federal requirements, Utah should make it easier for sources to meet the requirement by including it with other inventory requirements. Staff was concerned that TBAC may be a byproduct of some industrial processes and that sources may not know whether, or how much, TBAC they emit. Staff also was concerned that substantial changes would be required in DAQ's inventory process, including changes in workbooks used by sources and in the inventory database, with no environmental benefit.

Since the April Board meeting, staff has undertaken research to better understand the requirement and its implications for Utah sources. We have spoken with the lead EPA staff person, participated in a nationwide conference call conducted by STAPPA-ALAPCO where this new provision was discussed, and talked to potential Utah sources. From our multiple conversations with EPA staff and STAPPA-ALAPCO members, DAQ staff have learned:

- EPA staff said that they intend the rule to apply only to sources that add TBAC to compounds they manufacture: paint, adhesives, pesticides and cleaning compounds for machinery.
- EPA staff said that they have not considered how the TBAC reporting requirement fits within the federal Comprehensive Emissions Reporting Rule (CERR), nor how states will upload the TBAC information into the federal National Emissions Inventory (NEI). DAQ staff intends to ask STAPPA-ALAPCO to send a letter to EPA requesting that inventory changes be made by amending the CERR, not by addition to other federal rules.
- EPA's proposal of the rule (64 FR 52731, September 30, 1999) did not mention that EPA was considering requiring that TBAC be included as a separate inventory item, nor did the Preamble to the final rule discuss including it as an inventory item. It seems to have been added as an afterthought.
- Other states also have questions as to how TBAC emissions could be collected and reported, and why states or EPA would want that information.
- In the Federal Register notice, EPA said that TBAC emissions should be included in any future modeling, but it is not clear how it would be included, since the inventory would show the location where TBAC is added to a compound, but not the location where emissions occur when the compound is actually used.
- EPA is currently re-thinking its entire approach to exempting compounds from the VOC definition. Over the years, 45 compounds have been exempted, based on two different methodologies. Currently, EPA's Reactivity Research Working Group is considering how EPA should respond in the future to petitions to exempt compounds; EPA is expected to propose changes by the end of 2005.
- DAQ staff have spoken with the only two Utah sources (Companion Systems Incorporated and Delta Equipment Industrial Systems incorporated) in the SIC codes affected by the rule, and neither of them adds TBAC.

Staff recommendation: Attached is a draft of changes to the inventory rule that would be needed to add the requirement to inventory TBAC; the new language is found in Sections 5, 6, and 7.

However, staff recommends that the language not be proposed at this time. Adding it to our rules now will have no discernible effect on Utah sources. Since EPA is expected to overhaul its treatment of VOCs in the near future, staff prefer to make the necessary changes to inventory collection and reporting after EPA completes its more comprehensive changes.

1 **R307. Environmental Quality, Air Quality.**

2 **R307-150. Emission Inventories.**

3 **R307-150-1. Purpose and General Requirements.**

4 (1) The purpose of R305-150 is:

5 (a) to establish by rule the time frame, pollutants, and
6 information that sources must include in inventory submittals;
7 and

8 (b) to establish consistent reporting requirements for
9 stationary sources in Utah to determine whether sulfur dioxide
10 emissions remain below the sulfur dioxide milestones established
11 in the State Implementation Plan for Regional Haze, section
12 XX.E.1.a, incorporated by reference in R307-110-28.

13 (2) The requirements of R307-150 replace any annual
14 inventory reporting requirements in approval orders or operating
15 permits issued prior to December 4, 2003.

16 (3) Emission inventories shall be submitted on or before
17 ninety days following the effective date of this rule and
18 thereafter on or before April 15 of each year following the
19 calendar year for which an inventory is required. The inventory
20 shall be submitted in a format specified by the Division of Air
21 Quality following consultation with each source.

22 (4) The executive secretary may require at any time a full
23 or partial year inventory upon reasonable notice to affected
24 sources when it is determined that the inventory is necessary to
25 develop a state implementation plan, to assess whether there is
26 a threat to public health or safety or the environment, or to
27 determine whether the source is in compliance with R307.

28 (5) Recordkeeping Requirements.

29 (a) Each owner or operator of a stationary source subject
30 to this rule shall maintain a copy of the emission inventory
31 submitted to the Division of Air Quality and records indicating
32 how the information submitted in the inventory was determined,
33 including any calculations, data, measurements, and estimates
34 used. The records under R307-150-4 shall be kept for ten years.
35 Other records shall be kept for a period of at least five years
36 from the due date of each inventory.

37 (b) The owner or operator of the stationary source shall
38 make these records available for inspection by any
39 representative of the Division of Air Quality during normal
40 business hours.

41
42 **R307-150-2. Definitions.**

43 The following additional definitions apply to R307-150.

44 "Acute Contaminant" means any noncarcinogenic air
45 contaminant for which a threshold limit value - ceiling (TLV-C)
46 has been adopted by the American Conference of Governmental
47 Industrial Hygienists in its "Threshold Limit Values for

1 Chemical Substances and Physical Agents and Biological Exposure
2 Indices," 2003 edition.

3 "Carcinogenic Contaminant" means any air contaminant that
4 is classified as a known human carcinogen (A1) or suspected
5 human carcinogen (A2) by the American Conference of Governmental
6 Industrial Hygienists in its "Threshold Limit Values for
7 Chemical Substances and Physical Agents and Biological Exposure
8 Indices," 2003 edition.

9 "Chronic Contaminant" means any noncarcinogenic air
10 contaminant for which a threshold limit value - time weighted
11 average (TLV-TWA) having no threshold limit value - ceiling
12 (TLV-C) has been adopted by the American Conference of
13 Governmental Industrial Hygienists in its "Threshold Limit
14 Values for Chemical Substances and Physical Agents and
15 Biological Exposure Indices," 2003 edition.

16 "Dioxins" and "Furans" mean total tetra- through
17 octachlorinated dibenzo-p-dioxins and dibenzofurans.

18 "Emissions unit" means emissions unit as defined in R307-
19 415-3.

20 "Large Major Source" means a major source that emits or has
21 the potential to emit 2500 tons or more per year of oxides of
22 sulfur, oxides of nitrogen, or carbon monoxide, or that emits or
23 has the potential to emit 250 tons or more per year of PM10,
24 PM2.5, volatile organic compounds, or ammonia.

25 "Lead" means elemental lead and the portion of its
26 compounds measured as elemental lead.

27 "Major Source" means major source as defined in R307-415-3.

28 29 **R307-150-3. Applicability.**

30 (1) R307-150-4 applies to all stationary sources with
31 actual emissions of 100 tons or more per year of sulfur dioxide
32 in calendar year 2000 or any subsequent year unless exempted in
33 (a) below. Sources subject to R307-150-4 may be subject to
34 other sections of R307-150.

35 (a) A stationary source that meets the requirements of
36 R307-150-3(1) that has permanently ceased operation is exempt
37 from the requirements of R307-150-4 for all years during which
38 the source did not operate at any time during the year.

39 (b) Except as provided in (a) above, any source that meets
40 the criteria of R307-150-3(1) and that emits less than 100 tons
41 per year of sulfur dioxide in any subsequent year shall remain
42 subject to the requirements of R307-150-4 until 2018 or until
43 the first control period under the Western Backstop Sulfur
44 Dioxide Trading Program as established in R307-250-12(1)(a),
45 whichever is earlier.

46 (2) R307-150-5 applies to large major sources.

47 (3) R307-150-6 applies to:

- 1 (a) each major source that is not a large major source;
2 (b) each source with the potential to emit 5 tons or more
3 per year of lead; and
4 (c) each source not included in (2) or (3)(a) or (3)(b)
5 above that is located in Davis, Salt Lake, Utah, or Weber
6 Counties and that has the potential to emit 25 tons or more per
7 year of any combination of oxides of nitrogen, oxides of sulfur
8 and PM10, or the potential to emit 10 tons or more per year of
9 volatile organic compounds.
10 (4) R307-150-7 applies to Part 70 sources not included in
11 (2) or (3) above.
12

13 **R307-150-4. Sulfur Dioxide Milestone Inventory Requirements.**

14 (1) Annual Sulfur Dioxide Emission Report.

15 (a) Sources identified in R307-150-3(1) shall submit an
16 annual inventory of sulfur dioxide emissions beginning with
17 calendar year 2003 for all emissions units including fugitive
18 emissions.

19 (b) The inventory shall include the rate and period of
20 emissions, excess or breakdown emissions, startup and shut down
21 emissions, the specific emissions unit that is the source of the
22 air pollution, type and efficiency of the air pollution control
23 equipment, percent of sulfur content in fuel and how the percent
24 is calculated, and other information necessary to quantify
25 operation and emissions and to evaluate pollution control
26 efficiency. The emissions of a pollutant shall be calculated
27 using the source's actual operating hours, production rates, and
28 types of materials processed, stored, or combusted during the
29 inventoried time period.

30 (2) Each source subject to R307-150-4 that is also subject
31 to 40 CFR Part 75 reporting requirements shall submit a summary
32 report of annual sulfur dioxide emissions that were reported to
33 the Environmental Protection Agency under 40 CFR Part 75 in lieu
34 of the reporting requirements in (1) above.

35 (3) Changes in Emission Measurement Techniques.

36 (a) Each source subject to R307-150-4 that is also subject
37 to 40 CFR Part 75 and that uses 40 CFR Part 60, Appendix A, Test
38 Methods 2F, 2G, or 2H to measure stack flow rate shall adjust
39 reported sulfur dioxide emissions to ensure that the reported
40 sulfur dioxide emissions are comparable to 1999 emissions. The
41 calculations that are used to make this adjustment shall be
42 included with the annual emission report. The adjustment shall
43 be calculated using one of the methods in (i) through (iii)
44 below:

45 (i) Directly determine the difference in flow rate through
46 a side-by-side comparison of data collected with the new and old

1 flow reference methods required during a relative accuracy test
2 audit (RATA) test under 40 CFR Part 75.

3 (ii) Compare the annual average heat rate using heat input
4 data from the federal acid rain program (million Btu) and total
5 generation (megawatt (MW) Hrs) as reported to the federal Energy
6 Information Administration. The flow adjustment will be
7 calculated by using the following ratio: (Heat input/MW for
8 first full year of data using new flow rate method) divided by
9 (Heat input/MW for last full year of data using old flow rate
10 method).

11 (iii) Compare the cubic feet per minute per MW before and
12 after the new flow reference method based on continuous emission
13 monitoring data submitted in the federal acid rain program,
14 using the following equation: (Standard cubic feet (SCF)/Unit
15 of generation for first full year of data using new flow rate
16 method) divided by (SCF/unit of generation for last full year of
17 data using old flow rate method).

18 (b) Each source subject to R307-150-4 that uses a
19 different emission monitoring or calculation method than was
20 used to report their sulfur dioxide emissions in 1998 under
21 R307-150 or 1999 under 40 CFR Part 75 shall adjust their
22 reported emissions to be comparable to the emission monitoring
23 or calculation method that was used in 1998 or 1999, as
24 applicable. The calculations that are used to make this
25 adjustment shall be included with the annual emission report.

26
27 **R307-150-5. Sources Identified in R307-150-3(2), Large Major**
28 **Source Inventory Requirements.**

29 (1)(a) Each large major source shall submit an emission
30 inventory annually beginning with calendar year 2002. The
31 inventory shall include PM10, PM2.5, oxides of sulfur, oxides of
32 nitrogen, carbon monoxide, volatile organic compounds, and
33 ammonia for all emissions units including fugitive emissions.

34 (b) Each large major source that manufactures paints,
35 varnishes, lacquers, enamels and allied products, or that
36 manufactures industrial organic chemicals, shall submit an
37 inventory annually beginning with calendar year 2005 for any
38 tertiary butyl acetate added to manufactured products.

39 (2) For every third year beginning with 2005, the
40 inventory shall also include all other chargeable pollutants and
41 hazardous air pollutants not exempted in R307-150-8.

42 (3) For each pollutant specified in (1) or (2) above, the
43 inventory shall include the rate and period of emissions, excess
44 or breakdown emissions, startup and shut down emissions, the
45 specific emissions unit that is the source of the air pollution,
46 composition of air contaminant, type and efficiency of the air
47 pollution control equipment, and other information necessary to

quantify operation and emissions and to evaluate pollution control efficiency. The emissions of a pollutant shall be calculated using the source's actual operating hours, production rates, and types of materials processed, stored, or combusted during the inventoried time period.

R307-150-6. Sources Identified in R307-150-3(3).

(1) Each source identified in R307-150-3(3) shall submit an inventory every third year beginning with calendar year 2002 for all emissions units including fugitive emissions.

(a) The inventory shall include PM10, PM2.5, oxides of sulfur, oxides of nitrogen, carbon monoxide, volatile organic compounds, ammonia, other chargeable pollutants, and hazardous air pollutants not exempted in R307-150-8.

(b) Sources that manufacture paints, varnishes, lacquers, enamels and allied products, or that manufacture industrial organic chemicals, shall submit an inventory for tertiary butyl acetate added to manufactured products.

(b)c) For each pollutant, the inventory shall include the rate and period of emissions, excess or breakdown emissions, startup and shut down emissions, the specific emissions unit which is the source of the air pollution, composition of air contaminant, type and efficiency of the air pollution control equipment, and other information necessary to quantify operation and emissions and to evaluate pollution control efficiency. The emissions of a pollutant shall be calculated using the source's actual operating hours, production rates, and types of materials processed, stored, or combusted during the inventoried time period.

(2) Sources identified in R307-150-3(3) shall submit an inventory for each year after 2002 in which the total amount of PM10, oxides of sulfur, oxides of nitrogen, carbon monoxide, or volatile organic compounds increases or decreases by 40 tons or more per year from the most recently submitted inventory. For each pollutant, the inventory shall meet the requirements of R307-150-6(1)(a) and (b).

R307-150-7. Sources Identified in R307-150-3(4), Other Part 70 Sources.

(1) Sources identified in R307-150-3(4) shall submit the following emissions inventory every third year beginning with calendar year 2002 for all emission units including fugitive emissions.

(2) Sources identified in R307-150-3(4) shall submit an inventory for each year after 2002 in which the total amount of PM10, oxides of sulfur, oxides of nitrogen, carbon monoxide, or

1 volatile organic compounds increases or decreases by 40 tons or
2 more per year from the most recently submitted inventory.

3 (3) The emission inventory shall include individual
4 pollutant totals of all chargeable pollutants not exempted in
5 R307-150-8.

6 (4) Sources identified in R307-150-3(4) that manufacture
7 paints, varnishes, lacquers, enamels and allied products, or
8 that manufacture industrial organic chemicals, shall submit an
9 inventory for tertiary butyl acetate added to manufactured
10 products.

11
12 **R307-150-8. Exempted Hazardous Air Pollutants.**

13 (1) The following air pollutants are exempt from this rule
14 if they are emitted in an amount less than that listed in Table
15 1.

16 TABLE 1

17	18 CONTAMINANT	19 Pounds/year
18	Arsenic	0.21
19	Benzene	33.90
20	Beryllium	0.04
21	Ethylene oxide	38.23
22	Formaldehyde	5.83

23
24
25 (2) Hazardous air pollutants, except for dioxins or furans,
26 are exempt from being reported if they are emitted in an amount
27 less than the smaller of the following:

28 (a) 500 pounds per year; or

29 (b) for acute contaminants, the applicable TLV-C expressed
30 in milligrams per cubic meter and multiplied by 15.81 to obtain
31 the pounds-per-year threshold; or

32 (c) for chronic contaminants, the applicable TLV-TWA
33 expressed in milligrams per cubic meter and multiplied by 21.22
34 to obtain the pounds-per-year threshold; or

35 (d) for carcinogenic contaminants, the applicable TLV-C or
36 TLV-TWA expressed in milligrams per cubic meter and multiplied
37 by 7.07 to obtain the pounds-per-year threshold.

38
39 **KEY: air pollution, reports, inventories**

40 **[2003]2005**

19-2-104(1)(c)

41

BEFORE THE UTAH AIR QUALITY BOARD

RE:

MOTIONS TO STAY IN IPP
AND SEVIER POWER APPEALS.)

COPY

TRANSCRIPT OF HEARING PROCEEDINGS

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Salt Lake City, Utah
DATE: June 1, 2005
TIME: 1:41 p.m.
REPORTED BY: Kelly L. Wilburn, CSR, RPR

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BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – PSD Major
Modification to Add New Unit 3 at
Intermountain Power Generating
Station, Millard County, Utah
Project Code: N0327-010
DAQE-AN0327010-04

MOTION FOR
STAY PENDING
JUDICIAL APPEAL

**MOTION BY SIERRA CLUB AND GRAND CANYON TRUST
FOR A STAY OF PROCEEDINGS PENDING
JUDICIAL REVIEW**

By this motion and pursuant to Utah Admin. Rule R307-103-10(2), the Utah Chapter of the Sierra Club and the Grand Canyon Trust (collectively "Sierra Club") request a stay, pending judicial review, of the Board's May 11, 2005 Order denying them standing to contest the Utah Division of Air Quality's ("DAQ") Approval Order ("AO") granting a Prevention of Significant Deterioration ("PSD") permit to Intermountain Power Service Corporation ("IPSC").

I. Background

On November 16, 2004, the Sierra Club filed a Request for Agency Action ("Appeal") with the Utah Air Quality Board ("Board") contesting the DAQ AO granting a PSD permit to IPSC. The permit allows IPSC to construct and operate a 950 megawatt coal-fired power plant unit at the Intermountain Power Plant in Millard County, Utah. With its Appeal, Sierra Club filed a Statement of Standing and Petition to Intervene.

On November 12, 2004, IPSC also filed a Request for Agency Action, challenging the AO Condition 24 which states that "excess emissions due to scheduled maintenance, startup, and shutdown shall constitute a violation" of the permit. IPSC Request for Agency Action at 1. IPSC requested DAQ to revise the permit to eliminate the current provisions regarding scheduled

maintenance, startup, and shutdown and to replace these provisions with an "automatic exemption" as allegedly provided in Utah Admin. Code R307-107-1. *Id.* at 2.

In its Appeal of the IPSC AO, Sierra Club also challenged Condition 24. Specifically, Sierra Club contended that the affirmative defense provision of Condition 24, dealing with scheduled maintenance, startup, and shutdown, is legally flawed and conflicts with state law and the federally approved State Implementation Plan. Sierra Club Request for Agency Action at 14. Sierra Club requested that this Board rescind the provision or remand the AO to DAQ with instructions that the affirmative defense provision in Condition 24 of the AO be expunged. *Id.*

IPSC also objected to Sierra Club's Statement and Petition in a brief dated January 28, 2005. At its April 13, 2005 meeting, the Board heard oral argument on the issue of Sierra Club's standing to bring its Appeal. The Board deliberated the matter and determined that Sierra Club did not have standing. This determination was finalized in an Order approved at the Board's May 11, 2005 meeting.

II. Sierra Club is Entitled to a Stay

Pursuant to Rule R307-103-10(2), the Sierra Club requests a stay of the Board's Order pending judicial review. Utah Admin. Code R307-103-10(2). Specifically, Sierra Club seeks a stay of the IPP proceeding – the adjudication of the legality of Condition 24 – while the Sierra Club seeks judicial review of this Board's decision that the organization did not have standing to bring its Appeal.

Rule R307-103-10(2)(a) of the Utah Administrative Code allows a party seeking a stay of a board's final order to file a motion to that effect. Rule R307-103-10(2)(b) states that the Board "may" grant a stay if the standards of Rule R307-103-10(1)(b) are met. These standards, in turn are:

- (i) The party seeking the stay will suffer irreparable harm unless the stay is issued;
- (ii) The threatened injury to the party seeking the stay outweighs whatever damage the proposed stay is likely to cause the party restrained or enjoined;
- (iii) The stay, if issued, would not be adverse to the public interest; and,
- (iv) There is substantial likelihood that the party seeking the stay will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further adjudication.

Utah Admin. Code R307-103-10(1)(b). At the same time, the Utah Administrative Procedures Act provides "[u]nless precluded by another statute, the agency may grant a stay of its order or

other temporary remedy during the pendency of judicial review, according to the agency's rules."¹ Utah Code § 63-46b-18.

Based on these standards, this Board, and the public interest, would be well-served by granting Sierra Club a stay of the proceedings while the organization appeals the determination that it did not have standing to bring its Appeal.

First, the Sierra Club will suffer irreparable harm unless this stay is granted. This is because some or all of the pending proceeding, the adjudication of the adequacy of Condition 24 of the IPSC permit, will occur without the Sierra Club's full participation as a party. As a result, the Sierra Club will be unable to conduct discovery, unable to make motions, unable to present expert testimony and unable to cross-examine witnesses. The Sierra Club will be not be able to influence decisions made by this Board based on the full range of methods and techniques typically available to a party. As this Board is exposed to the parties' arguments and their marshalling of the facts, and as this Board progressively makes decisions based on those arguments and facts, the Sierra Club will be increasingly prejudiced by its inability to participate in this proceeding as a party.

In addition, irreparable harm to the environment, human health, and the economic well-being of the citizens of the State could result if this proceeding is not delayed pending adjudication of the standing issue. In its Appeal, Sierra Club asserts that the law requires more stringent regulation of emissions released during scheduled maintenance, startup and shut down - emissions that result in environmental, and economic harms and adversely impact human health. If Sierra Club is denied full participation in this proceeding and is not allowed to bring its facts and arguments before this Board, as a party, in conjunction with the other parties, the result could well be a permit that insufficiently restricts harmful emissions.

Second, the harm caused by a delay of this proceeding will not be substantial. Eventually, once the Sierra Club's appeal of the standing decision is resolved, all qualified parties can participate in a fair and complete hearing of the issues. No party will be prejudiced by this interruption because there is currently no stay of the AO and IPSC will not begin to construct its plant anytime soon. Thus, the irreparable prejudice to Sierra Club that would result if the proceeding were to go forward far outweighs the mere inconvenience that might result from a postponement of the proceeding.

Third, for the same reason, the public interest would not be harmed, and indeed, would benefit from a delay of this proceeding. Little or no harm would result as a consequence of a postponement of this matter. At the same time, if the Utah Courts ultimately find that Sierra Club has standing, the remedy would likely require reinitiation of this entire proceeding from the

¹ Sierra Club's request for a stay of this proceeding can be characterized either as a stay of this Board's Order, which allows the proceeding to go forward based on its determination of the parties involved, or as a temporary remedy during the pendency of judicial review.

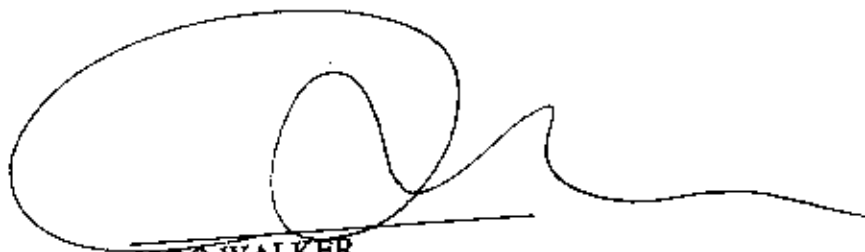
time the organization was excluded as a party. Starting over at the beginning would be costly, time consuming and inefficient and would therefore be detrimental to the public good.

Fourth, as the organization set forth in its Statement of Standing and Petition for Intervention and replies to the oppositions to its Statement and Petition, Sierra Club is likely to succeed on the merits of its Appeal.² The Sierra Club has documented that it has representational standing to challenge the adequacy of the AO. Members of the Sierra Club live, work and recreate in areas that will be impacted by the proposed construction and operation of IPP Unit 3. They will suffer health, economic, aesthetic, environmental, and recreational injuries as a result of emissions from the planned expansion. Moreover, Sierra Club has properly pointed out that DAQ's decision to approve IPP Unit 3 is a matter of great public importance, with significant consequences that will be felt across Utah. As a result, the Sierra Club is entitled to ask this Board to review the relevant PSD permit and to ensure that the DAQ approved permit for the proposed coal-fired power plant is strictly in keeping with all applicable laws.

Similarly, the issue of Sierra Club's standing "presents serious issues on the merits which should be the subject of further adjudication." Utah Admin. Code R307-103-10(1)(b)(iv). Utah's courts are best equipped to determine the legal issue of Sierra Club's standing and should be given the opportunity to do so before this adjudication proceeds. Because the Utah Court of Appeals may well conclude that Sierra Club is entitled to full participation in this proceeding, justice, efficiency and the public interest are best served by postponing this proceeding until the court weighs in on the issue of Sierra Club's standing.

Wherefore, the Sierra Club respectfully requests that this Board stay its May 11, 2005 Order or otherwise grant temporary relief that would halt the adjudication of the DAQ AO for the PSD permit for the IPSC facility pending Sierra Club's appeal of that Order.

Dated: May 11, 2005



JORO WALKER
Attorney for Sierra Club and
Grand Canyon Trust

² Sierra Club hereby references and incorporates herein its Statement of Standing and Petition for Intervention and its replies to opposition to its Statement and Petition.

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2005, I served a true and correct copy of the foregoing
**MOTION BY SIERRA CLUB AND GRAND CANYON TRUST FOR A STAY OF
PROCEEDINGS PENDING JUDICIAL REVIEW** on the following:

By Hand Delivery:

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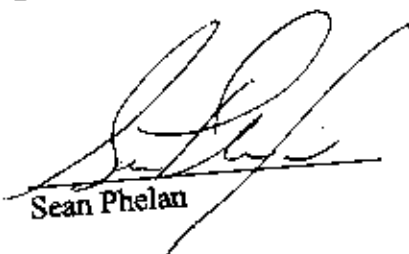
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Attorneys for Intermountain Power Service Corporation

BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – PSD Major
Modification to Add New Unit 3 at
Intermountain Power Generating Station,
Millard County, Utah
Project Code: N0327-010
DAQE-AN0327010-04

MEMORANDUM IN OPPOSITION TO
SIERRA CLUB'S AND GRAND
CANYON TRUST'S MOTION FOR
STAY OF PROCEEDINGS PENDING
JUDICIAL APPEAL

By way of this brief, filed pursuant to Utah Administrative Code R307-103-7,
Intermountain Power Service Corporation ("IPSC") opposes the Sierra Club and Grand Canyon
Trust's (collectively "Sierra Club's") Motion for a Stay of Proceedings Pending Judicial Appeal.
IPSC requests that the Utah Board of Air Quality ("the Board") deny the Sierra Club's request
for a stay of the Board's May 12, 2005 Order and the request to stay IPSC's appeal of Condition
24.

INTRODUCTION AND STATEMENT OF FACTS

Having failed at its first attempt to derail IPSC's proposed addition to its electric
generating facility, Sierra Club takes this second bite at the apple through its Motion for Stay.

This Board should deny Sierra Club's Motion to Stay because Sierra Club fails to meet any of the four legal criteria established by the Board's rules for a stay. Additionally, based on this Board's May 12, 2005 Order, the Sierra Club is not a "party" to any proceeding before the Board regarding IPP Unit 3 and, by rule, does not have standing to seek a stay from the Board. These issues are explained in more detail in the Argument section below.

By way of background, IPSC filed in December of 2002 a Notice of Intent ("NOI") to construct and operate a 950 megawatt coal-fired power plant unit ("Unit 3") at the Intermountain Power Plant ("IPP") located in Millard County, Utah. The public comment period for the Unit 3 NOI began in April of 2004. An additional public comment period started in June of 2004 because of a defect in the public notice of the first public comment period. After considering the comments and information from both public comment periods, the Utah Division of Air Quality ("DAQ") issued an Approval Order ("AO") for the IPP Unit 3 project on October 15, 2004.

On November 16, 2004, Sierra Club filed a Request for Agency Action with the Board contesting DAQ's Approval Order granting a Prevention of Significant Deterioration ("PSD") permit to IPSC for Unit 3. Sierra Club's Request for Agency Action was accompanied with a Statement of Standing and Petition to Intervene.

On January 28, 2005, IPSC filed a Memorandum in Opposition to Sierra Club's Statement of Standing and Petition to Intervene. The Board held oral argument on April 13, 2005 on Sierra Club's Statement of Standing and Petition to Intervene. Following oral argument, the Board concluded that Sierra Club did not have standing to Request Agency Action contesting the DAQ's Approval Order granting IPSC's air permit.

The Board's final order denying Sierra Club's Statement of Standing and Petition to Intervene was entered on May 12, 2005 (attached as Exhibit A). Even before the Order was signed and entered, Sierra Club filed a Motion for Stay on May 11, 2005 requesting a "stay, pending judicial review, of the Board's May [12], 2005 Order" which denied Sierra Club standing.

ARGUMENT

I. THE BOARD SHOULD DENY SIERRA CLUB'S MOTION FOR STAY BECAUSE THE REQUEST FOR STAY DOES NOT MEET THE FOUR-PART TEST ESTABLISHED BY UTAH LAW.

The Utah Administrative Procedures Act ("UAP") provides that an agency may grant a stay of its orders during the pendency of judicial review and that the agency may grant the stay in accordance with its own rules. Utah Code Ann. §63-46b-18(1). The Board's rules with respect to requesting and granting a stay are set forth at rule R307-103-10 of the Utah Administrative Code. R307-103-10-(2)(b) provides that the Board may only grant a stay if the following four standards are met:

- (i) The party seeking the stay will suffer irreparable harm unless the stay is issued;
- (ii) The threatened injury to the party seeking the stay outweighs whatever damage the proposed stay is likely to cause the party restrained or enjoined;
- (iii) The stay, if issued, would not be adverse to the public interest; and
- (iv) There is a substantial likelihood that the party seeking the stay will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further adjudication.

Based on the Board's own May 12 Order, Sierra Club's Motion for Stay fails. A party seeking a stay must bring forth credible evidence that it meets the four-part test for a stay. Sierra Club's Motion to Stay does not provide any evidence that Sierra Club will "suffer irreparable harm," or "any threatened injury outweighing injury to IPSC," or that a stay "would not be adverse to the public interest," or that Sierra Club has a "substantial likelihood" of overturning on appeal the Board's May 12 Order regarding standing.

Sierra Club's Motion to Stay must be denied, first and foremost, because Sierra Club cannot establish, as required by rule, that they will suffer irreparable harm unless the stay is issued. Sierra Club argues that it will suffer irreparable harm because, without the stay, IPSC's Request for Agency Action regarding Condition 24 (which addresses emissions during startup, shutdown, and malfunction) will proceed without the Sierra Club.

Much like its previous arguments regarding standing, Sierra Club offers no proof that "irreparable harm" will actually occur. Instead, Sierra Club asks this Board to infer that irreparable harm will occur because of Sierra Club's absence from the proceedings. The mere absence of a party is not evidence of "irreparable harm." Just as Sierra Club failed to establish any credible evidence of injury or a causal link between its asserted harms and DAQ's actions in its arguments for standing, Sierra Club once again has failed to establish any credible evidence of "irreparable harm" or a causal link between the alleged irreparable harm and Sierra Club's absence from any future proceeding on IPP Unit 3's air permit.

Sierra Club also asserts that without a stay there will be irreparable harm to the "environment, human health, and the economic well-being of the citizens of the State." Sierra

Club made these same general, unsupported arguments in its Statement of Standing and Petition to Intervene. Rejecting that argument, the Board specifically found in the May 12 Order that Sierra Club's allegations regarding "visibility, concern for public health, and global warming . . . did not rise to the level of being a demonstration of a distinct and palpable injury." Moreover, the Board found that Sierra Club could not establish that its concerns about the environment and public health were causally linked to the DAQ's approval of the PSD permit. Sierra Club has not presented the Board with any new or additional evidence that would change the Board's conclusions regarding the effect of the Approval Order on public health and the environment. Therefore, Sierra Club has not demonstrated that denying the stay will result in any irreparable injury to public health or the environment during the pendency of the appeal.

To obtain a stay, Sierra Club also must demonstrate that "[t]he threatened injury to the party seeking the stay outweighs whatever damage the proposed stay is likely to cause the party restrained or enjoined." R307-103-10(1)(b)(ii). As demonstrated above, Sierra Club has no evidence that it will be injured if a stay is not issued. IPSC, on the other hand, could suffer enormous additional costs if Sierra Club is granted a stay. A delay of this proceeding until the conclusion of Sierra Club's appeal could potentially delay this matter eighteen months or more, impacting IPSC's current construction schedule for IPP Unit 3 and the date IPP Unit 3 will be come operational.

A delay in construction and eventual operation of the plant could result in substantial cost increases. In fact, a delay of one year could increase the costs associated with IPSC's coal contracts by tens, or even hundreds, of millions of dollars. Moreover, if interests rates were to

increase by one full percentage point over this time frame, the increased financing cost potentially could be in the tens of millions of dollars. Due to the scale and nature of IPP Unit 3, significant delays in the project could impact the overall cost of the project by hundreds of millions of dollars. The potential economic impact to IPSC if a stay is granted far outweighs the non-harms identified by Sierra Club.

Third, Sierra Club must show that "[t]he stay, if issued, would not be adverse to the public interest." R307-103-10(1)(b)(iii). The potential economic impact of any delays in a utility project of this size is not in the public interest, as increased costs in the construction of IPP Unit 3 would likely impact the cost of power to the consumer. In addition, the western United States is in desperate need of additional power generating facilities to meet increased future power needs, and for that additional power to remain affordable.

Finally, Sierra Club must demonstrate that "[t]here is substantial likelihood that the party seeking the stay will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further adjudication." R307-103-10(1)(b)(iv). The Board correctly found, and held in its May 12 Order, that Sierra Club lacks standing to challenge the permit for IPP Unit 3. Sierra Club cannot establish that they will likely prevail in their appeal of the Board's May 12 Order. There is no reason why the Board should believe that the very arguments asserting that Sierra Club has standing, which were rejected by the Board only a few weeks ago, will now succeed on appeal. Sierra Club has presented the Board with no evidence or legal argument that would suggest that Sierra Club will overturn the Board's denial of standing on appeal. Therefore, Sierra Club has not demonstrated a likelihood

of success on the merits. The Board should deny Sierra Club's attempt to delay the IPP Unit 3 project any longer.

II. THE BOARD CANNOT GRANT SIERRA CLUB A STAY AS IT IS NOT A PARTY.

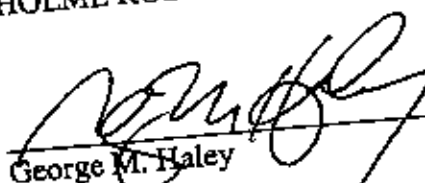
The Board's administrative rule regarding stays specifically provides that "[a] party seeking a stay of the board's final order during the pendency of judicial review shall file a motion with the board." R307-103-10 (emphasis added). This administrative rule specifically provides that only a party may seek a stay from the Board pending an appeal. However, the Board specifically found in its May 12, 2005 Order that Sierra Club is not a "party" and has no standing in the present matter. Therefore, Sierra Club cannot seek a stay from the Board.

CONCLUSION

Sierra Club is not entitled to a stay because it has failed to meet the requirements of R307-103-10(1)(b). Furthermore, the Board found that Sierra Club lacked standing, Sierra Club is not a party, and the applicable regulations only allow a "party" to seek a stay before the Board. Sierra Club's Motion for Stay should be denied. Granting the stay would be unprecedented and could cause a significant increase in the cost of IPP Unit 3.

RESPECTFULLY SUBMITTED this 23 day of May, 2005.

HOLME ROBERTS & OWEN LLP


George M. Haley
E. Blaine Rawson
*Attorneys for Intermountain Power Generating
Station*

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2005, undersigned served a copy of the foregoing **MEMORANDUM IN OPPOSITION TO SIERRA CLUB'S AND GRAND CANYON TRUST'S MOTION FOR STAY OF PROCEEDINGS PENDING JUDICIAL APPEAL** on the following by:

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Sean Phelan
Western Resource Advocates
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Lammy M. Tonnisen

Exhibit A

BEFORE THE
UTAH AIR QUALITY BOARD

In the Matter of:

*

*

Order re Petitions to Intervene

Unit 3, Intermountain Power Service
Corporation, Millard County, Utah
DAQE-AN0327010-04

*

*

On April 13, 2005, parties and participants appeared before the Utah Air Quality Board in the above-entitled matter for hearing on petitions to intervene by Sierra Club and Grand Canyon Trust, Millard County Commission, and PacifiCorp. Joro Walker and Sean Phelan appeared for Sierra Club and Grand Canyon Trust, LeRay G. Jackson appeared for the Millard County Commission, George Haley and E. Blaine Rawson appeared for Intermountain Power Service Corporation, Michael Jenkins and Martin Banks appeared for PacifiCorp, and Richard Rathbun and Christian Stephens appeared for the Executive Secretary. Utah Air Quality Board members present were John Veranth, Dianne Nielson, Jerry Grover, James Horrocks, Richard Olson, Jeffrey Utley, Marcelle Shoop, and Ernest Wessman. Mr. Wessman recused himself because of his employment relationship with PacifiCorp. Fred Nelson acted as counsel for the Board.

1. By pleading dated November 15, 2004, the Utah Chapter of the Sierra Club and Grand Canyon Trust (collectively referred to herein as "Sierra Club") filed a Request for Agency Action seeking review of the October 15, 2004 decision by the Executive Secretary of the Utah Air Quality Board to issue an Approval Order granting a permit to Intermountain Power Service Corporation ("IPSC") to construct and operate an additional coal-fired power plant Unit #3 at the Intermountain Power Plant in Millard County, Utah. The Sierra Club also filed a Statement of

Standing/Petition to Intervene. IPSC filed an opposition to the Sierra Club's petition to intervene. The Executive Secretary filed a response not opposing the petition. Sierra Club filed a reply.

2. By pleading dated December 23, 2004, the Millard County Commission filed a Statement of Standing and Petition to Intervene in the above-captioned proceeding. Sierra Club and the Executive Secretary filed responses opposing intervention by the Millard County Commission. Millard County filed a reply.

3. By pleading dated January 4, 2005, PacifiCorp filed a Petition to Intervene in the above-captioned proceeding, and included a Statement of Standing. The Sierra Club and Executive Secretary filed responses opposing intervention by PacifiCorp. PacifiCorp filed replies.

Parties and Intervention

Pursuant to UAC R307-103-6, the Executive Secretary and IPSC are considered to be parties to the proceeding. Sierra Club and Grand Canyon Trust must be granted intervention by the Board under UAC R307-103-6 in order to go forward with their Request for Agency Action. In addition, the Millard County Commission and PacifiCorp must be granted intervention in order to participate as parties in the proceedings.

The rules of the Board provide that a petition to intervene must meet UCA Section 63-46b-9 which requires a demonstration "that the petitioner's legal rights or interests are substantially affected by the formal adjudicative proceeding, or that the petitioner qualifies as an intervenor under any provision of law." The Board shall grant a petition to intervene if it determines that

"(a) the petitioner's legal interests may be substantially affected by the formal adjudicative proceeding; and

"(b) the interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention."

Further, the Board rules provide that "[n]o person may initiate or intervene in an agency action unless that person has standing. Standing shall be evaluated using applicable Utah case law." UAC Section R307-103-6(3). Under Utah case law, standing is established under one of three general rules. First, a plaintiff may show some distinct and palpable injury that gives rise to a personal stake in the outcome of the dispute. If a plaintiff cannot meet the first standard, standing may still be established for important public issues if no one else has a greater interest in the outcome and the issues are unlikely to be raised at all unless that plaintiff has standing to raise the issues. Finally, a plaintiff may maintain a suit in a case that raises issues that are so unique and of such great importance that they ought to be decided in furtherance of the public interest. *National Parks and Conservation Association v. Board of State Lands*, 869 P.2d 909, 913 (Utah 1993).

Two additional principles, here applicable, are one, that if an association seeks standing, it must show that its individual members have standing. *Sierra Club v. Dept. Of Environmental Quality*, 857 P.2d 982, 986 n.8 (Utah App. 1993), and two, the burden of proof is on the applicant to establish standing. *Washington County Water Conservancy District v. Morgan*, 82 P.3d 1125 (Utah Ct. App. 2003).

Intervention of Sierra Club

The Board denies intervention to the Sierra Club. Sierra Club has standing to pursue its

petition only if it can establish that it has a distinct and palpable injury resulting from the Executive Secretary's granting of the permit, that it is the most appropriate plaintiff to bring the action, or that it raises issues of such public importance that they ought to be decided in furtherance of the public interest. Sierra Club failed to meet any of these criteria.

Sierra Club presented affidavits from three of its members to support its claim of distinct and palpable injury. Brian Cass, an Arizona resident, who owns a home in Boulder, Utah, alleges that emissions from the plant would affect visibility on the Colorado Plateau and therefore impact his activities as a videographer and a person who recreates in the area. He also expresses a belief that emissions will impair his and his family's health when in Utah. He expresses concern that the value of his property would decrease and emissions would contribute to global warming. Stephen Trimble, resident of Salt Lake County, who also owns a home in Torrey, Utah, alleges that emissions from the plant would affect his activities as a photographer, author, and naturalist in the areas of the Great Basin Desert and Colorado Plateau by impacting visibility, his health and the health of his family, the value of his property, and that emissions would contribute to global warming. Ray Bloxham, a resident of Salt Lake County, who alleges he travels extensively and frequently in the Great Basin Desert and the Colorado Plateau, believes the plant would impair visibility, affect his health and the health of his family, and would contribute to global warming.

The Board finds that the Sierra Club has not met its burden of proof in demonstrating distinct and palpable injury. The allegations of effect on visibility, concern for public health, and global warming are general public concerns that do not establish a personal, particularized stake in the issuance of the permit. These general allegations raised by Sierra Club members do not

rise to the level of being a demonstration of a distinct and palpable injury. Further, no evidence is proffered that the general allegations of adverse impact on Sierra Club members are caused by the Executive Secretary's approval of the addition of a Unit 3 to the existing two units of the IPP power plant. These interests asserted by the members of the Sierra Club are interests that are shared in common by other members of the public at large and are not particularized. Finally, the affidavits do not demonstrate a connection between the alleged improper permitting actions and a particular injury to the three affiants, nor has Sierra Club presented other evidence to support those claims.

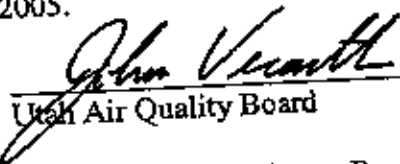
In addition, the Board finds that the issuance of the approval order for Unit 3 and information presented to the Board do not establish Sierra Club as the most appropriate entity to present public issues nor are issues raised of such great importance that would warrant standing being granted to the Sierra Club without a demonstration of particularized injury. Unit 3 is an addition to two already existing operating units. IPP Unit 3 is not unique, in that there are a number of coal-fired plants that are currently permitted in Utah. The rules of the Board outline a process for receiving public input on permits pending before the Executive Secretary. Pursuant to UAC R307-401-4, the public is invited to comment on proposed approval orders. Sierra Club submitted comments and the Executive Secretary considered those comments in issuing the permit for Unit 3. This process, in addition to the process of allowing petitions for rulemaking or requests to the Board to establish policy positions on issues of public interest, are proper legal forums for persons and organizations without particularized injury to have their issues considered. Unless a distinct and palpable injury is demonstrated, or another of the standing tests is met, the adjudicative process is not available to challenge a decision by the Executive

Secretary to grant a permit. This result constitutes a balancing of the interests and legal rights of those obtaining a permit with the right to challenge the permit if injury is demonstrated.

Intervention by Millard County Commission and PacifiCorp

Having denied Sierra Club's petition to intervene, it is unnecessary to rule on the petitions to intervene of Millard County Commission and PacifiCorp who only petitioned to intervene in opposition to the issues raised by the Sierra Club.

DATED this 12 day of May, 2005.


Utah Air Quality Board

Notice of the Right to Apply for Reconsideration or Review

Within 20 days after the date this final order is signed in this matter by the Utah Air Quality Board, any party shall have the right to apply for reconsideration with the Board, pursuant to Utah Code Ann. § 63-46b-13. The request for reconsideration should state the specific grounds upon which relief is requested and should be submitted in writing to the Board at 168 North 1950 West, Salt Lake City, Utah, 84114. A copy of the request must be mailed to each party by the person making the request. The filing of a request for reconsideration is not a prerequisite for seeking judicial review of this Order.

Notice of the Right to Petition for Judicial Review

Judicial review of this Order may be sought in the Utah Court of Appeals under Utah Code Ann. § 63-46b-16 and the Utah Rules of Appellate Procedure by the filing of a proper petition within thirty days after the date of this Order.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2005, I caused a copy of the forgoing Order re Petitions to Intervene to be mailed by United States Mail, postage prepaid, to the following:

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BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of:

Unit 3, Intermountain Power Service
Corporation, Millard County, Utah
DAQE-AN0327010-04,

EXECUTIVE SECRETARY'S
MEMORANDUM IN OPPOSITION TO
SIERRA CLUB'S MOTION FOR STAY
PENDING JUDICIAL APPEAL

COMES NOW the Executive Secretary of the Utah Division of Air Quality (Executive Secretary), and hereby opposes Sierra Club and Grand Canyon Trust's (Sierra Club) Motion for a Stay of Proceeding Pending Judicial Appeal of the Utah Air Quality Board's (the Board) final order denying standing to Sierra Club in the above-encaptioned matter.

I. Introduction

On October 15, 2004, the Executive Secretary issued an Approval Order (AO) to Intermountain Power Corporation (IPSC) to build an additional unit at the Intermountain Power Plant in Millard County, Utah. On November 16, 2005, Sierra Club filed a Request for Agency Action pursuant to R307-103-3. Among other things, Sierra Club challenged IPSC AO Condition 24, claiming that the condition did not comply with the law.

On November 16, 2005, IPSC filed its own Request for Agency Action, also contesting AO Condition 24, albeit for different reasons. Through its request, IPSC petitioned the Executive Secretary to revise the disputed condition to provide an automatic exemption for

scheduled maintenance, startup, shutdown, and malfunction. The Board consolidated the requests.

Although the Executive Secretary did not oppose Sierra Club's standing, IPSC challenged Sierra Club's Petition to Intervene. Specifically, IPSC argued that Sierra Club did not have standing to intervene. On April 13, 2005, the Board determined that Sierra Club did not have standing to pursue its challenge of the IPSC AO. The Board finalized this determination in an order signed on May 12, 2005. Sierra Club subsequently filed a Petition for Review with the Utah Court of Appeals on May 17, 2005, seeking review of the Board's denial of standing. Pursuant to Utah Administrative Code R307-103-10(2), Sierra Club desires a stay of any proceedings regarding Condition 24 of the IPSC AO. Specifically, while seeking judicial review of the Board's denial of standing, Sierra Club simultaneously seeks a stay of any further proceedings on the IPSC Request for Agency Action, the lone remaining issue in the IPSC matter.

II. The Board Should Deny Sierra Club's Motion for Stay

Section 63-46b-18(1) of the Utah Administrative Procedures Act provides that an agency may grant a stay of its own order: "[u]nless precluded by another statute, the agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, according to the agency's rules." Utah Admin. Code R307-103-10 governs stays of the Executive Secretary's administrative orders and outlines how a petitioner requests a stay. Specifically, the Board "may order a stay of the order if the party seeking the stay" satisfies each of the following four requirements:

- (i) The party seeking the stay will suffer irreparable harm unless the stay is issued;
- (ii) The threatened injury to the party seeking the stay outweighs whatever damage the proposed stay is likely to cause the party restrained or enjoined;

(iii) The stay, if issued, would not be adverse to the public interest; and

(iv) There is substantial likelihood that the party seeking the stay will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further adjudication.

Utah Admin. Code R307-103-10(1)(b).

By its terms, the above rule requires that the party seeking the stay must satisfy all four criteria. Even if Sierra Club could satisfy all the criteria, the Board would still not be required to grant the stay. As the Executive Secretary demonstrates below, Sierra Club cannot satisfy any of the four standards.

II.A. Sierra Club Will Not Be Irreparably Harmed by a Denial of the Motion for Stay

Sierra Club has failed to show that it will be irreparably harmed by a denial of the stay. In its motion Sierra Club claims that "[n]o party will be prejudiced by [the granting of the stay] because there is currently no stay of the AO and ISPC will not begin to construct its plant anytime soon." Sierra Club Motion for Stay at 3. The Executive Secretary understands this statement to mean that regardless of the imposition of a stay, Sierra Club expects to receive an appellate ruling on its standing denial well before IPSC ever constructs Unit 3. If such is the case, the Executive Secretary submits that the very harm Sierra Club claims is irreparable could not take place, even in the absence of a stay. Unit 3 must be constructed for the harm to occur. But Sierra Club's own motion suggests that construction will not begin until long after the Utah Court of Appeals has settled the standing questions. Thus, any alleged irreparable harm is not only unlikely, it is impossible. Sierra Club's failure to satisfy this first requirement is fatal to its request to obtain a stay.

II.B. The Alleged Threat of Injury to Sierra Club Does Not Outweigh the Damage That Would Be Caused the Executive Secretary

The applicable provision of the Utah Air Rules states that to satisfy the second requirement, "the threatened injury to the party seeking the stay" must outweigh the "damage the proposed stay is likely to cause" the party to be enjoined. Utah Administrative Code R307-103-10(1)(b)(ii). This second requirement presents the greatest consequence for the Executive Secretary. Sierra Club is not now and never has been a party to these proceedings. Yet if the Board grants a stay, the existence of the stay may allow Sierra Club to interfere with any proposed resolution between the parties to the IPSC AO appeal.

The permit at issue here is IPSC's, not Sierra Club's. Nonparties should not be permitted to use an administrative stay to prevent the sound operation of government and interfere with the ability of a permit holder to seek a resolution to a dispute. If the Board grants the stay, Sierra Club will likely argue not only that the existence of the stay somehow enjoins both the Executive Secretary and IPSC from moving forward formally with the appeal, but also that the Executive Secretary and IPSC may not seek any resolution at all, either through a final Board order or negotiated settlement. Such an approach would allow a nonparty (Sierra Club) to impose a de facto veto over any action taken by the real parties in interest, the Executive Secretary and IPSC.

On the most basic level, the Executive Secretary seeks to protect the Division of Air Quality's ability to perform its regulatory mandate without a nonparty's interference. The Division of Air Quality staff meets routinely with sources to resolve permit and compliance issues after the Executive Secretary has issued final orders. If the board grants the stay pursuant to a motion from a nonparty and the stay has the effect Sierra Club appears to suggest, potentially all these regulatory functions could not take place without the participation or permission of an organization such as Sierra Club. The Board should not grant a stay where the purpose is to hamper or delay the regulatory functioning of the agency.

The Board has already decided that Sierra Club does not have standing. As shown above, granting the stay requested by a nonparty would permit Sierra Club to exert a measure of control over the actual parties. Unless and until the Utah Court of Appeals determines that Sierra Club has standing, Sierra Club should not be permitted to act as a full party, be it temporary, informal, or otherwise. Therefore, because issuance of the stay would allow Sierra Club to interfere with the progress of the proceedings, "the threatened injury to the party seeking the stay" would not outweigh the "damage the proposed stay is likely to cause" the Executive Secretary. Utah Administrative Code R307-103-10(1)(b)(ii).

Finally, Sierra Club asserts that "the harm caused by a delay of this proceeding will not be substantial." Sierra Club Motion for Stay at 3. The Executive Secretary respectfully disagrees with that conclusory assessment. A possible yearlong delay in the resolution of this matter is hardly a "mere inconvenience" to the parties. *Id.*

II.C. Granting the Stay Would be Adverse to the Public Interest

IPSC and the Executive Secretary are currently involved in settlement negotiations over IPSC AO Condition 24. If granted, the stay may hamper those negotiations, or even prevent a settlement from occurring. As a taxpayer-funded public entity, the Division of Air Quality seeks to perform its regulatory functions without undue delay or interference. Granting the stay might compel the Executive Secretary to forgo the benefit of resolving the dispute with IPSC in a timely manner, either by a Board order or through settlement. Therefore, granting the stay would be adverse to the public interest.

III.D. Sierra Club is Unlikely to Prevail on the Merits of the Underlying Claim and the Request for Agency Action at Issue does not Present Serious Issues That Should Be the Subject of Further Adjudication

Fourth, Sierra Club's motion does not show or explain how the organization will have a substantial likelihood of prevailing on the merits of the underlying dispute, or that its Request for

Agency Action presents serious issues that should be the subject of further adjudication. Specifically, Sierra Club was unable to make the necessary showing to convince the Board that Sierra Club had standing. Since appellate review of the Boards' order on standing will be restricted to the record, Sierra Club will be unable to present any new evidence to argue that it has standing. Moreover, Sierra Club's motion has also failed to show how the organization is likely to prevail on the merits in its challenges of the IPSC AO. Therefore, Sierra Club is unlikely to prevail on the underlying claims.


The use of coal-fired power plants for energy production is a legislative policy decision, and outside the authority of the Executive Secretary or the Board. The State of Utah already hosts many other coal-fired power plants, so Condition 24 of the IPSC AO is not unique and does not present "serious issues on the merits which should be the subject of further adjudication." Utah Administrative Code R307-103-10(2)(b)(iv). *See also* Sierra Club v. Utah Solid and Hazardous Waste Control Bd., 964 P.2d 335, 340 (Utah Ct. App. 1998) (stating that the uniqueness of the Tooele Chemical Agent Demilitarization Facility is an example of a serious public issue). Because Sierra Club is unlikely to prevail on the merits of the underlying claim and has not presented serious issues that should be the subject of further adjudication, Sierra Club cannot satisfy this requirement.

III. Conclusion

Sierra Club has failed to satisfy the requirements for a stay, and the Executive Secretary respectfully requests that the Air Quality Board exercise its discretion and deny Sierra Club's Motion for a Stay of Proceeding Pending Judicial Appeal.

DATED this 23rd day of May, 2005.

MARK L. SHURTLEFF
Utah Attorney General



RICHARD K. RATHBUN
CHRISTIAN C. STEPHENS
Assistant Attorneys General

CERTIFICATE OF SERVICE


I hereby certify that on this 23rd day of May, 2005, I caused a copy of the foregoing Executive Secretary's Memorandum in Opposition to Sierra Club's Motion for a Stay of Proceeding Pending Judicial Appeal to be mailed by United States Mail, postage prepaid, to the following:

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BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – the Sevier	:	MOTION FOR
Power Company 270 MW Coal-Fired	:	STAY PENDING
Power Plant, Sevier County	:	JUDICIAL REVIEW
Project Code: N2529-001	:	
DAQE-AN2529001-04	:	

**MOTION BY SIERRA CLUB AND GRAND CANYON TRUST
FOR A STAY OF PROCEEDINGS PENDING
JUDICIAL REVIEW**

By this motion and pursuant to Utah Admin. Rule R307-103-10(2), the Utah Chapter of the Sierra Club and the Grand Canyon Trust (collectively "Sierra Club") request a stay, pending judicial review, of the Board's May 11, 2005 Order denying them standing to contest the Utah Division of Air Quality's ("DAQ") Approval Order ("AO") granting a Prevention of Significant Deterioration ("PSD") permit to Sevier Power Company ("SPC").

I. Introduction

On November 12, 2004, the Sierra Club filed a Request for Agency Action ("Appeal") with the Utah Air Quality Board ("Board") contesting the DAQ AO granting a PSD permit to SPC. The permit allows SPC to construct and operate a 270 mega-watt coal-fired power plant in Sigurd, Utah. With its Appeal, Sierra Club filed a Statement of Standing and Petition to Intervene.

SPC objected to Sierra Club's Statement and Petition in a brief dated January 28, 2005. At its April 13, 2005 meeting, the Board heard oral argument on the issue of Sierra Club's standing, deliberated the matter, and determined that Sierra Club did not have standing. As a result, the Board dismissed the Sierra Club's Request for Agency Action. The Board's rulings were set forth in an Order approved at its May 11, 2005 meeting.

In its Order, the Board granted a single organization, Sevier Citizens for Clean Air and Water ("Sevier Citizens"), standing to pursue its Request for Agency Action. Currently, Sevier Citizens is not represented by counsel in this adjudication.

In its Appeal, Sierra Club raised numerous claims not asserted by Sevier Citizens in its Request for Agency Action. For example, Sierra Club challenges DAQ's failure to address carbon dioxide and other greenhouse gas emissions as part of the SPC permitting process, while Sevier Citizens did not. Sierra Club, unlike Sevier Citizens, also asserts that DAQ failed to sufficiently consider carbon injection for the control of mercury, failed to require appropriate NOx BACT limits, failed to require continuous opacity monitoring, and failed to justify sufficiently its determination that SPC plant emissions would not cause or contribute to violations of PM-10 standards.

In their appeals, Sierra Club and Sevier Citizens also make similar challenges. Both groups contest the failure of DAQ to consider adequately integrated gasification combined cycle (IGCC) technology as part of its BACT analysis, to address sufficiently impacts to visibility, soils and vegetation, and to evaluate properly emission impacts on Class I areas, especially Capitol Reef National Park.

II. Sierra Club is Entitled to a Stay

Pursuant to Rule R307-103-10(2), the Sierra Club requests a stay of the Board's Order pending judicial review. Utah Admin. Code R307-103-10(2). Specifically, Sierra Club seeks a stay of the this proceeding – the adjudication of the legality of the SPC permit – while the Sierra Club seeks judicial review of this Board's decision that the organization did not have standing to bring its Appeal.

Rule R307-103-10(2)(a) of the Utah Administrative Code allows a party seeking a stay of a board's final order to file a motion to that effect. Rule R307-103-10(2)(b) states that the Board "may" grant a stay if the standards of Rule R307-103-10(1)(b) are met. These standards, in turn are:

- (i) The party seeking the stay will suffer irreparable harm unless the stay is issued;
- (ii) The threatened injury to the party seeking the stay outweighs whatever damage the proposed stay is likely to cause the party restrained or enjoined;
- (iii) The stay, if issued, would not be adverse to the public interest; and,
- (iv) There is substantial likelihood that the party seeking the stay will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further adjudication.

Utah Admin. Code R307-103-10(1)(b). At the same time, the Utah Administrative Procedures Act provides "[u]nless precluded by another statute, the agency may grant a stay of its order or

time the organization was excluded as a party. Starting over at the beginning would be costly, time consuming and inefficient and would therefore be detrimental to the public good. Similarly, a full and fair review of the issues Sierra Club raises in its Appeal could ultimately benefit the public, as more restrictions on harmful emissions could be added to the SPC permit as a result of this process.

Fourth, as the organization sets forth in its Statement of Standing and Petition for Intervention and replies to the oppositions to its Statement and Petition, Sierra Club is likely to succeed on the merits of its Appeal.² The Sierra Club has documented that it has representational standing to challenge the adequacy of the AO. Members of Sierra Club live, work and recreate in areas that will be impacted by the proposed SPC Plant. Members of Sierra Club will suffer health, economic, aesthetic, environmental, and recreational injuries as a result of emissions from the planned facility. Moreover, Sierra Club has properly pointed out that DAQ's decision to approve the SPC Plant is a matter of great public importance, with significant consequences that will be felt across Utah. As a result, the Sierra Club is entitled to ask this Board to review the relevant PSD permit and to ensure that the DAQ approved permit for the proposed coal-fired power plant is strictly in keeping with all applicable laws.

Similarly, the issue of Sierra Club's standing "presents serious issues on the merits which should be the subject of further adjudication." Utah Admin. Code R307-103-10(1)(b)(iv). Utah's courts are best equipped to determine the legal issue of Sierra Club's standing and should be given the opportunity to do so before this adjudication proceeds. Because the Utah Court of Appeals may well conclude that Sierra Club is entitled to full participation in this proceeding, justice, efficiency and the public interest are best served by postponing this proceeding until the court weighs in on the issue of Sierra Club's standing.

Wherefore, the Sierra Club respectfully requests that this Board stay its May 11, 2005 Order or otherwise grant temporary relief that would halt the adjudication of the DAQ AO for the PSD permit for the SPC facility pending Sierra Club's appeal of that Order.

Dated: May 11, 2005



JORO WALKER

Attorney for Sierra Club and Grand Canyon Trust

² Sierra Club hereby references and incorporates herein its Statement of Standing and Petition for Intervention and its replies to opposition to its Statement and Petition.

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2005, I served a true and correct copy of the foregoing **MOTION BY SIERRA CLUB AND GRAND CANYON TRUST FOR A STAY OF PROCEEDINGS PENDING JUDICIAL REVIEW** on the following:

By Hand Delivery:

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Attorneys for the Sevier Power Company

RECEIVED
MAY 23 2005
AIR QUALITY

BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – the Sevier	:	OPPOSITION BRIEF TO
Power Company 270 MW Coal-Fired	:	MOTION FOR STAY
Power Plant, Sevier County	:	PENDING JUDICIAL
Project Code: N2529-001	:	REVIEW
DAQE-AN2529001-04	:	

The Sevier Power Company (the "SPC") is opposed to the **Motion for Stay Pending Judicial Review** by the Sierra Club and Grand Canyon Trust (collectively "Sierra Club") and requests that the Utah Air Quality Board (the "Board") deny the Motion for Stay for the following reasons contained in this brief.

Introduction

On the 12th of October, 2004, Richard W. Sprott, Executive Secretary of the Utah Air Quality Board signed the Approval Order to authorize the construction and operation of the Sevier Power Company 270 MW Coal-Fired Power Plant in Sigurd, Utah. On November 12, 2004, the Sierra Club filed a Request for Agency Action ("Appeal") and filed a Petition to Intervene. The SPC objected to the standing of the Sierra Club. The standing issues were briefed, and orally argued before the Board at the April 13, 2005 meeting. The Board's order on standing, approved at the May 11, 2005 meeting, denied standing to the Sierra Club. The Sierra Club has given notice that it intends to appeal the decision of the Board to the Court of Appeals and has requested by motion that the Board stay further proceedings on the formal review of the Approval Order during the appeal in the Court of Appeals.

Opposition Argument

Standing is necessary to be a party. Without standing, the Sierra Club is not entitled to either intervene, or seek a stay.

The Rules of the Division of Air Quality make it clear that standing is required to be party. "Rule 307-103-6(3). Standing. No person may initiate or intervene in an agency action unless the party has standing. Standing shall be evaluated using applicable Utah case law." Rule 307-103-10 identifies the process to obtain a stay of a challenged order. It requires the "party" seeking a stay to file a motion before the Board. However, without standing, an entity can not be

a party to a proceeding. The Board has denied standing to the Sierra Club; it does not have standing to be a "party" and without standing, it is not entitled to file a motion before the Board requesting a stay.

Even if the Sierra Club had standing, its request for a stay would fail on the merits to meet the requirements necessary for a stay.

Rule 307-103-10(1) (b) sets forth requirements that must be met in order for the Board to grant a stay. These standards are:

- (i) The party seeking the stay will suffer irreparable harm unless the stay is issued;
- (ii) The threatened injury to the party seeking the stay outweighs whatever damage the proposed stay is likely to cause the party restrained or enjoined;
- (iii) The stay, if issued, would not be adverse to the public interest; and,
- (iv) There is substantial likelihood that the party seeking the stay will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be subject of further adjudication.

The Board in its standing order approved at the May 11, 2005 meeting, granted *amicus curia* status to the Sierra Club. The Board meetings are public, they have a limited participation already granted by the Board. It is hard to imagine that the Sierra Club will suffer irreparable harm if the Board continues with the review of the Approval Order.

The injury complained about by the Sierra Club that this review will proceed without them as a full party fails with the injury inflicted upon the SPC. Generally turn around time in the Court of Appeals could take up to 18 months. This means that the permit status for the SPC would be on a hold for that same time. The addition of the stay period to the current review period will create a significant hardship on the development plans of the SPC. The damage to SPC is far greater than the alleged damage to the Sierra Club caused by the Board's continued review of the Approval Order, issued almost a year ago. The extra carrying costs of the SPC project for the stay period are very significant.

It is difficult to determine what the Public interest is. To the public that utilizes electric power, the delay, in obtaining additional supplies of low cost power from Utah coal, is adverse. To the public in Sevier County that would benefit from the jobs associated with the power plant and associated coal mining jobs, the delay would be adverse. To the Citizen living right next to the power plant, any delay associated with the stay would not be adverse.

The fourth standard requires that there is a substantial likelihood that the Sierra Club will prevail before the Court of Appeals in over turning the decision of the Board on the rejection of their standing status. The Court of Appeals in order to reverse the Board must find that the Board did not follow its own rules, or that they have made an arbitrary or capricious decision, not related to the facts submitted to the Board. The Appellant Sierra Club has a very difficult burden to carry in the Court of Appeals. To conclude that they have a substantial likelihood that they will prevail on this standing issue is too far of a stretch to justify the granting of a stay.

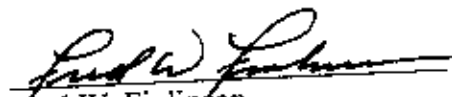
In order to receive a stay from the Board, the requesting party, should have standing and be able to meet the standards required by the Board's rule as discussed above. The Board's rule for granting stays is consistent with the requirements for granting a stay as set forth in the Utah Administrative Procedures Act ("UAPA" UCA 63-46b-18, 1953 as amended.) In order to obtain a stay, the party must meet all four standards. The Sierra Club is not able to meet all of the required standards.

By requesting the Board to grant a stay, the Sierra Club avoids the costs of a bond that would be required by the Court of Appeals to grant the same stay.

Asking a decision making body to stop further proceedings, while the losing party seeks an appeal of an order to a higher authority is not a favored motion. It is not granted often and then only when strict standards are met. Refer to the Board's own rules mentioned above for stays. In the judicial system, the requirements are similar, irreparable harm, likelihood of prevailing and the addition requirement of a bond. The Rules of Appellate Procedure require the party seeking the stay, to file a bond pursuant to Rule 62 of the Utah Rules of Civil Procedure. The bond is required to protect the prevailing party from the delay and the fact that the appealing party may not prevail at the appellate court level. Rule 62 provides a process to determine the amount of bond to fully protect the prevailing party during the stay. Failure to prevail, allows the bond to be converted for the benefit of the prevailing party. The SPC Power Plant is a \$500,000,000 dollar capital project. A year's delay will cause a significant amount of harm to the SPC. Since the Board's rules do not provide for any kind of bond during the review process or during the stay period, while the matter is being reviewed by the Court of Appeals, the granting of a stay by the Board would deny the SPC the protection offered by the bonding requirement of Rule 62.

Wherefore, the Sevier Power Company respectfully request that this Board deny the Sierra Club's Motion for Stay Pending Judicial Review.

Dated: May 23, 2005



Fred W. Finlinson
Finlinson & Finlinson, PLLC
Attorney for the Sevier Power Company

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2005, I caused a copy of the foregoing **Opposition Brief to Motion For Stay Pending Judicial Review** to be mailed by United States Mail, postage prepaid, to the following:

Sean Phelan Joro Walker Western Resource Advocates 1473 S 1100 E Suite F Salt Lake City, Utah 84105	Fred G. Nelson Counsel, Utah Air Quality Board 160 East 300 South, 5 th Floor Salt Lake City, Utah 84114-0873
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AIR QUALITY

BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – the Sevier	:	OPPOSITION BRIEF TO
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DAQE-AN2529001-04	:	

The Sevier Power Company (the "SPC") is opposed to the **Motion for Stay Pending Judicial Review** by the Sierra Club and Grand Canyon Trust (collectively "Sierra Club") and requests that the Utah Air Quality Board (the "Board") deny the Motion for Stay for the following reasons contained in this brief.

Introduction

On the 12th of October, 2004, Richard W. Sprott, Executive Secretary of the Utah Air Quality Board signed the Approval Order to authorize the construction and operation of the Sevier Power Company 270 MW Coal-Fired Power Plant in Sigurd, Utah. On November 12, 2004, the Sierra Club filed a Request for Agency Action ("Appeal") and filed a Petition to Intervene. The SPC objected to the standing of the Sierra Club. The standing issues were briefed, and orally argued before the Board at the April 13, 2005 meeting. The Board's order on standing, approved at the May 11, 2005 meeting, denied standing to the Sierra Club. The Sierra Club has given notice that it intends to appeal the decision of the Board to the Court of Appeals and has requested by motion that the Board stay further proceedings on the formal review of the Approval Order during the appeal in the Court of Appeals.

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Even if the Sierra Club had standing, its request for a stay would fail on the merits to meet the requirements necessary for a stay.

Rule 307-103-10(1) (b) sets forth requirements that must be met in order for the Board to grant a stay. These standards are:

- (i) The party seeking the stay will suffer irreparable harm unless the stay is issued;
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It is difficult to determine what the Public interest is. To the public that utilizes electric power, the delay, in obtaining additional supplies of low cost power from Utah coal, is adverse. To the public in Sevier County that would benefit from the jobs associated with the power plant and associated coal mining jobs, the delay would be adverse. To the Citizen living right next to the power plant, any delay associated with the stay would not be adverse.

The fourth standard requires that there is a substantial likelihood that the Sierra Club will prevail before the Court of Appeals in over turning the decision of the Board on the rejection of their standing status. The Court of Appeals in order to reverse the Board must find that the Board did not follow its own rules, or that they have made an arbitrary or capricious decision, not related to the facts submitted to the Board. The Appellant Sierra Club has a very difficult burden to carry in the Court of Appeals. To conclude that they have a substantial likelihood that they will prevail on this standing issue is too far of a stretch to justify the granting of a stay.

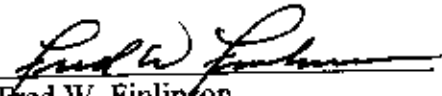
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By requesting the Board to grant a stay, the Sierra Club avoids the costs of a bond that would be required by the Court of Appeals to grant the same stay.

Asking a decision making body to stop further proceedings, while the losing party seeks an appeal of an order to a higher authority is not a favored motion. It is not granted often and then only when strict standards are met. Refer to the Board's own rules mentioned above for stays. In the judicial system, the requirements are similar, irreparable harm, likelihood of prevailing and the addition requirement of a bond. The Rules of Appellate Procedure require the party seeking the stay, to file a bond pursuant to Rule 62 of the Utah Rules of Civil Procedure. The bond is required to protect the prevailing party from the delay and the fact that the appealing party may not prevail at the appellate court level. Rule 62 provides a process to determine the amount of bond to fully protect the prevailing party during the stay. Failure to prevail, allows the bond to be converted for the benefit of the prevailing party. The SPC Power Plant is a \$500,000,000 dollar capital project. A year's delay will cause a significant amount of harm to the SPC. Since the Board's rules do not provide for any kind of bond during the review process or during the stay period, while the matter is being reviewed by the Court of Appeals, the granting of a stay by the Board would deny the SPC the protection offered by the bonding requirement of Rule 62.

Wherefore, the Sevier Power Company respectfully request that this Board deny the Sierra Club's Motion for Stay Pending Judicial Review.

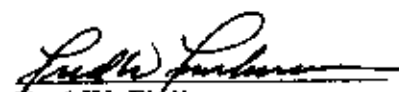
Dated: May 23, 2005


Fred W. Finlinson
Finlinson & Finlinson, PLLC
Attorney for the Sevier Power Company

CERTIFICATE OF SERVICE

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BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of:

Sevier Power Company Power Plant
Sevier County, Utah
DAQE-AN2529001-04

EXECUTIVE SECRETARY'S
MEMORANDUM IN OPPOSITION TO
SIERRA CLUB'S MOTION FOR STAY
PENDING JUDICIAL APPEAL

COMES NOW the Executive Secretary of the Utah Division of Air Quality (Executive Secretary), and hereby opposes Sierra Club and Grand Canyon Trust's (Sierra Club) Motion for a Stay of Proceeding Pending Judicial Appeal of the Utah Air Quality Board's (the Board) final order denying standing to Sierra Club in the above-captioned matter.

I. Introduction

On October 12, 2004, the Executive Secretary issued an Approval Order (AO) to Sevier Power Company (SPC) to construct and operate a coal-fired power plant in Sevier County, Utah. On November 1, 2005, Sevier County Citizens for Clean Air and Water (Sevier County Citizens) filed a Request for Agency Action appealing the SPC AO. On November 12, 2005, Sierra Club filed a Request for Agency Action pursuant to R307-103-3. Sierra Club also filed a Statement of Standing and Petition to Intervene, seeking to demonstrate that it had standing to pursue its challenge to the SPC AO.

SPC challenged Sierra Club's standing but did not oppose the standing of Sevier County Citizens. The Executive Secretary did not oppose Sierra Club's standing but did challenge the legal adequacy of the Sevier County Citizens' petition. At the April 13, 2005 Air Quality Board meeting, the Executive Secretary represented that he no longer opposed Sevier County Citizens based on additional submissions that demonstrated a legal basis for its petition. After oral argument and debate, the Board determined that while Sevier County Citizens had standing to pursue its appeal, Sierra Club did not have standing. However, the Board granted Sierra Club amicus curiae status.

The Board finalized this determination with an order signed on May 12, 2005. Sierra Club subsequently filed a Petition for Review with the Utah Court of Appeals on May 17, 2005, seeking review of the Board's denial of standing. Pursuant to Utah Administrative Code R307-103-10(2), Sierra Club desires a stay of any proceedings regarding the legality of various aspects of the SPC AO while Sierra Club seeks judicial review of the Board's denial of standing.

II. The Board Should Deny Sierra Club's Motion for Stay

Section 63-46b-18(1) of the Utah Administrative Procedures Act provides that an agency may grant a stay of its own order: "[u]nless precluded by another statute, the agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, according to the agency's rules." Utah Admin. Code R307-103-10 governs stays of the Executive Secretary's administrative orders and outlines how a petitioner requests a stay. Specifically, the Board "may order a stay of the order if the party seeking the stay" satisfies each of the following four requirements:

- (i) The party seeking the stay will suffer irreparable harm unless the stay is issued;
- (ii) The threatened injury to the party seeking the stay outweighs whatever damage the proposed stay is likely to cause the party restrained or enjoined;

(iii) The stay, if issued, would not be adverse to the public interest; and

(iv) There is substantial likelihood that the party seeking the stay will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further adjudication.

Utah Admin. Code R307-103-10(1)(b).

By its terms, the above rule requires that the party seeking the stay must satisfy all four criteria. Even if Sierra Club could satisfy all the criteria, the Board would still not be required to grant the stay. As the Executive Secretary demonstrates below, Sierra Club cannot satisfy any of the four standards.

II.A. Sierra Club Will Not Be Irreparably Harmed by a Denial of the Motion for Stay

First, irreparable harm will not occur because the Board has granted Sierra Club amicus curiae status. As amicus curiae Sierra Club will have the opportunity to present to the Board its position on issues raised by the parties. Although Sierra Club raises some separate issues from Sevier County Citizens, Sierra Club raised its issues during the comment period and thus has had an opportunity to present its views. These views were considered by the Executive Secretary in his decision to grant the AO.

In its motion Sierra Club claims that "[n]o party will be prejudiced by [the granting of the stay] because there is currently no stay of the AO and SPC will not begin to construct its plant anytime soon." Sierra Club Motion for Stay at 3. The Executive Secretary understands this statement to mean that regardless of the imposition of a stay, Sierra Club expects to receive an appellate ruling on its standing denial well before SPC ever constructs its plant. If such is the case, the Executive Secretary submits that the very harm Sierra Club claims is irreparable could not take place, even in the absence of a stay. The SPC plant must be constructed for the harm to occur. But Sierra Club's own motion suggests that construction will not begin until long after

the Utah Court of Appeals has settled the standing questions. Thus, any alleged irreparable harm is not only unlikely, it is impossible. Sierra Club's failure to satisfy this first requirement is fatal to its request to obtain a stay.

II.B. The Alleged Threat of Injury to Sierra Club Does Not Outweigh the Damage Would Cause the Executive Secretary

The applicable provision of the Utah Air Rules states that to satisfy the second requirement, "the threatened injury to the party seeking the stay" may not outweigh the "damage the proposed stay is likely to cause" the party to be enjoined. Utah Administrative Code R307-103-10(1)(b)(ii). This second requirement presents the greatest consequence for the Executive Secretary. Sierra Club is not now and never has been a party to these proceedings. Yet if the Board grants a stay, the existence of the stay may allow Sierra Club to interfere with any proposed resolution between the parties to the SPC AO appeal.

The permit at issue here is SPC's, not Sierra Club's. Nonparties should not be permitted to use an administrative stay to prevent the sound operation of government and interfere with the ability of a permit holder to seek a resolution to the dispute. If the Board grants the stay, Sierra Club will likely argue not only that the existence of the stay somehow enjoins both the Executive Secretary and SPC from moving forward formally with the appeal, but also that the Executive Secretary, Sevier County Citizens, and SPC may not seek any resolution at all, either through negotiated settlement or otherwise. Such an approach would allow a nonparty (Sierra Club) to impose a de facto veto over any action taken by the real parties in interest, the Executive Secretary, Sevier County Citizens, and SPC.

On the most basic level, the Executive Secretary seeks to protect the Division of Air Quality's ability to perform its regulatory mandate without a nonparty's interference. The Division of Air Quality staff meets routinely with sources to resolve permit and compliance

issues after the Executive Secretary has issued final orders. If the board grants the stay pursuant to a motion from a nonparty and the stay has the effect Sierra Club appears to suggest, potentially all these regulatory functions could not take place without the participation or permission of an organization such as Sierra Club. The Board should not grant a stay where the purpose is to hamper or delay the regulatory functioning of the agency.

The Board has already decided that Sierra Club does not have standing. As shown above, granting the stay that a nonparty has requested would permit Sierra Club to exert a measure of control over the actual parties. Unless and until the Utah Court of Appeals determines that Sierra Club has standing, Sierra Club should not be permitted to act as a full party, be it temporary or otherwise. Therefore, because issuance of the stay would allow Sierra Club to interfere with the progress of the proceedings, "the threatened injury to the party seeking the stay" would not outweigh the "damage the proposed stay is likely to cause" the Executive Secretary. Utah Administrative Code R307-103-10(1)(b)(ii).

Finally, Sierra Club asserts that "the harm caused by a delay of this proceeding will not be substantial." Sierra Club Motion for Stay at 3. The Executive Secretary respectfully disagrees with that conclusory assessment. A possible yearlong delay in the resolution of this matter is hardly a "mere inconvenience" to the parties. Id.

II.C. Granting the Stay Would be Adverse to the Public Interest

Third, promptly moving forward with discovery and a hearing is in the public interest, as undue delay wastes scarce government resources. The Executive Secretary is prepared to defend the AO and wishes to move forward immediately. If granted, the stay would indefinitely postpone the proceedings. As a taxpayer-funded public entity, the Division of Air Quality seeks to perform its regulatory functions without undue delay or interference. If the stay is granted, the Executive Secretary will be compelled to forgo the benefit of resolving the dispute with SPC and

Sevier County Citizens in a timely manner, either by Board order or through settlement. As granting the stay would cause unreasonable delay, the stay would be adverse to the public interest.

II.D. Sierra Club is Unlikely to Prevail on the Merits of the Underlying Claim and the Request for Agency Action at Issue Does Not Present Serious Issues That Should Be the Subject of Further Adjudication

Fourth, Sierra Club's motion does not show or explain how the organization will have a substantial likelihood of prevailing on the merits of the underlying dispute, or that its Request for Agency Action presents serious issues that should be the subject of further adjudication. Specifically, Sierra Club was unable to make the necessary showing to convince the Board that Sierra Club had standing. Since appellate review of the Boards' order on standing will be restricted to the record, Sierra Club will be unable to present any new evidence to argue that it has standing. Moreover, Sierra Club's motion has also failed to show how the organization is likely to prevail on the merits in its challenges of the SPC AO. Therefore, Sierra Club is unlikely to prevail on the underlying claims.

The use of coal-fired power plants for energy production is a legislative policy decision, and outside the authority of the Executive Secretary or the Board. The State of Utah already hosts many other coal-fired power plants, so the SPC AO is not unique and does not present "serious issues on the merits which should be the subject of further adjudication." Utah Administrative Code R307-103-10(2)(b)(iv). See also Sierra Club v. Utah Solid and Hazardous Waste Control Bd., 964 P.2d 335, 340 (Utah Ct. App. 1998) (stating that the uniqueness of the Tooele Chemical Agent Demilitarization Facility is an example of a serious public issue). Because Sierra Club is unlikely to prevail on the merits of the underlying claim and has not


presented serious issues that should be the subject of further adjudication, Sierra Club cannot satisfy this requirement.

III. Conclusion

Sierra Club has failed to satisfy the requirements for a stay, and the Executive Secretary respectfully requests that the Air Quality Board exercise its discretion and deny Sierra Club's Motion for a Stay of Proceeding Pending Judicial Appeal.

DATED this 23rd day of May, 2005.

MARK L. SHURTLEFF
Utah Attorney General



RICHARD K. RATHBUN
CHRISTIAN C. STEPHENS
Assistant Attorneys General

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2005, I caused a copy of the foregoing Executive Secretary's Memorandum in Opposition to Sierra Club's Motion for a Stay of Proceeding Pending Judicial Appeal to be mailed by United States Mail, postage prepaid, to the following:

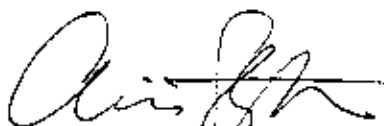
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IPP &

SEVIER POWER

CARBON
FIBER



State of Utah

Department of
Environmental Quality

Dianne R. Nielson, Ph.D.
Executive Director

DIVISION OF AIR QUALITY
Richard W. Sprott
Director

JON M. HUNTSMAN, JR.
Governor

GARY HERBERT
Lieutenant Governor

DAQ-031-2005

MEMORANDUM

TO: Air Quality Board

THROUGH: Richard W. Sprott, Executive Secretary

FROM: Timothy DeJulis, Engineer

DATE: May 19, 2005

SUBJECT: Modification of DAQE-AN1386012-04 by Adding Carbon Fiber Production Process Equipment Items

Hexcel Corporation located at 6800 West 5400 South, West Valley City, Salt Lake County, has requested modification of their existing approval order, DAQE-AN1386012-04, dated August 26, 2004. The requested changes involve the installation of an additional carbon fiber production process line, with associated equipment items, and pollution control devices, and a related increase in annual production levels.

The operations associated with Hexcel are listed in the Salt Lake County PM₁₀ SIP (Section IX, Part H.2.b.T). In accordance with R307-305-2 the Air Quality Board is reviewing this proposed modification because specific SIP limits will be changing. There will be an increase in the allowed annual production of carbon fibers, and the potential to emit values are increasing. Annual production of carbon fiber, will increase by 1,500,000 pounds, and their potential to emit values, in tons per year, will change as follows: NO_x (+ 17.26), SO₂ (+ 7.05), VOC (+ 3.65).

Hexcel conducted air dispersion modeling for certain HAPs, and it demonstrates that no off-property impacts exist. Air dispersion modeling for criteria pollutants was not required. There are no PSD, or NAAQS increments consumed, nor were external emission offset credits needed. Best Available Control Technology will be required. No public comments were received, nor was a public hearing requested.

It is the recommendation of the NSR staff that you approve Hexcel's proposed modification.



State of Utah

Department of
Environmental Quality

Dianne R. Nielson, Ph.D.
Executive Director

DIVISION OF AIR QUALITY
Richard W. Spratt
Director

JON M. HUNTSMAN, JR.
Governor

GARY HERBERT
Lieutenant Governor

DAQE-IN1386013-05

April 6, 2005

Shannon Storrud
Hexcel Corporation
Composite Products Div.
PO Box 18748
Salt Lake City, Utah 84118-748

Dear Mr. Storrud:

Re: Intent to Approve: Modify DAQE-AN1386012-04 by Adding Carbon Fiber Production Process Equipment Items, Salt Lake County, CDS A; NA; MAINT; HAPs; SIP; NSPS, MACT; Title V Major
Project Code: N1386-013

The attached document is the Intent to Approve (ITA) for the above-referenced project. ITAs are subject to public review. Any comments received shall be considered before an Approval Order is issued.

Future correspondence on this Intent to Approve should include the engineer's name as well as the DAQE number as shown on the upper right-hand corner of this letter. Please direct any technical questions you may have on this project to Mr. Tim De Julis. He may be reached at (801) 536-4012.

Sincerely,

Rusty Ruby, Manager
New Source Review Section

RR:TD:jc

cc: Salt Lake Valley Health Department

Mike Owens, EPA Region VIII

STATE OF UTAH

Department of Environmental Quality

Division of Air Quality

**INTENT TO APPROVE: Modify DAQE-AN1386012-04 by
Adding Carbon Fiber Production Process Equipment Items**

**Prepared By: Tim De Julis, Engineer
(801) 536-4012
Email: tdejulis@utah.gov**

INTENT TO APPROVE NUMBER

DAQE-IN1386013-05

Date: April 6, 2005

Hexcel Corporation

**Source Contact
Shannon Storrud
(801) 508-8011**

**Richard W. Sprott
Executive Secretary
Utah Air Quality Board**

Abstract

Hexcel Corporation (Hexcel) owner and operator of the carbon fiber, and fabric pre-impregnation (pre-preg) manufacturing plant located at 6800 West 5400 South, West Valley City, Salt Lake County, has requested modifications to their existing approval order (AO). The requested changes are associated with an expansion of annual carbon fiber production, and include the installation of a new carbon fiber production line (Fiber Line 8) to be housed in a new production building (#2480). The new process will consist of four low temperature ovens, one low temperature furnace, one high temperature furnace, one fume incinerator, one surface treatment area and mix room, one sizing application area, and one diesel fueled, emergency generator (400 kW). The potential levels of hydrogen cyanide pollution from this new process line will be abated by use of the above fume incinerator, as part of a sealed ventilation system. Additional pollution control measures involve the use of oxidizing burner boxes located at the entrance to each high-temperature furnace, use of steam utility for product drying, and the use of electrically heated process furnaces. Hexcel anticipates producing an additional 1,500,000 pounds of carbon fiber annually, for a total of 5,500,000 pounds.

Salt Lake County is a Non-attainment area of the National Ambient Air Quality Standards (NAAQS) for PM_{10} and Sulfur Dioxide (SO_2), and is a maintenance area for ozone. New Source Performance Standards (NSPS) (40 CFR 60), and Maximum Achievable Control Technology (MACT) standards (40 CFR 63) apply to this source. National Emission Standards for Hazardous Air Pollutants (NESHAP) regulations (40 CFR 61) do not apply to this source. Title V of the 1990 Clean Air Act applies to this major source. This source requires a Title V operating permit. Hexcel is listed in the Utah State Implementation Plan (SIP). Hexcel's proposed changes to their plant must be considered, and approved by the Utah Air Quality Board before an AO can be issued.

The emissions, in tons per year, will change as follows:

NO_x (+ 17.26), SO_2 (+ 7.05), VOC (+ 3.65)

The changes in emissions will result in the following potential to emit totals, in tons per year:

PM_{10} = 71.16, NO_x = 112.49, SO_2 = 11.08, CO = 32.82, VOC = 29.00, HAPs = 600.45.

The Notice of Intent (NOI) for the above-referenced project has been evaluated and has been found to be consistent with the requirements of the Utah Administrative Code Rule 307 (UAC R307). Air pollution producing sources and/or their air control facilities may not be constructed, installed, established, or modified prior to the issuance of an Approval Order (AO) by the Executive Secretary of the Utah Air Quality Board.

A 30-day public comment period will be held in accordance with UAC R307-401-4. A notice of intent to approve will be published in the Salt Lake Tribune and Deseret News on April 10, 2005. During the public comment period the proposal and the evaluation of its impact on air quality will be available for both you and the public to review and comment. If anyone so requests a public hearing it will be held in accordance with UAC R307-401-4. The hearing will be held as close as practicable to the location of the source. Any comments received during the public comment period and the hearing will be evaluated.

Please review the proposed AO conditions during this period and make any comments you may have. The proposed conditions of the AO may be changed as a result of the comments received. Unless changed, the AO will be based upon the following conditions:

General Conditions:

1. This Approval Order (AO) applies to the following company:

Site Office

Hexcel Corporation
Salt Lake Operations
P.O. Box 18748
Salt Lake City, Utah 84188-0748

Phone Number: (801) 508-8599

Fax Number: (801) 508-8090

The equipment listed in this AO shall be operated at the following location:

6800 West 5400 South West Valley City, Salt Lake County

Universal Transverse Mercator (UTM) Coordinate System: UTM Datum NAD27
4,500.6 kilometers Northing, 410.9 kilometers Easting, Zone 12

2. All definitions, terms, abbreviations, and references used in this AO conform to those used in the Utah Administrative Code (UAC) Rule 307 (R307) and Title 40 of the Code of Federal Regulations (40 CFR). Unless noted otherwise, references cited in these AO conditions refer to those rules.
3. The limits set forth in this AO shall not be exceeded without prior approval in accordance with R307-401.
4. Modifications to the equipment or processes approved by this AO that could affect the emissions covered by this AO must be reviewed and approved in accordance with R307-401-1.
5. All records referenced in this AO, or in applicable MACT standards, which are required to be kept by the owner/operator, shall be made available to the Executive Secretary or Executive Secretary's representative upon request, and the records shall include the two-year period prior to the date of the request. Records shall be kept for the following minimum periods:
 - A. Emission inventories Five years from the due date of each emission statement or until the next inventory is due, whichever is longer.
 - B. All other records Five years
6. Hexcel Corporation shall conduct its operations of the carbon fiber plant in accordance with the terms and conditions of this AO, which was written pursuant to Hexcel's Notice of Intent submitted to the Division of Air Quality (DAQ) on January 18, 2005, and additional information submitted on March 15, 2005, March 24, 2005, and April 4, 2005.

7. Regardless of any inconsistency between conditions of this AO and Section IX, Part H, of the SIP, this AO shall take precedence as provided by R307-305-2. The language of Section IX, Part H.2.a and Section IX, Part H.2.b.T has been incorporated into this AO.
8. This AO shall replace the AO (DAQE-AN1386012-04) dated August 26, 2004.

Limitations and Tests Procedures

9. Visible emissions from all emission points shall not exceed a 10% opacity limit. Opacity observations of emissions from stationary sources shall be conducted according to 40 CFR 60, Appendix A, Method 9.
10. The following consumption/production limits shall not be exceeded:
 - A. 550,000,000 cubic feet of natural gas consumed per rolling 12-month period
 - B. 5,500,000 pounds of carbon fibers produced from the fiber lines per rolling 12-month period.
 - C. 1,000,000 pounds of curing agents consumed per 12-month period
 - D. 6,500,000 pounds of resins consumed per 12-month period
 - E. The total use rate for maintenance and testing per each emergency generator engine shall not exceed 65 hours per rolling 12-month period.

Compliance with the limitations shall be determined on a rolling 12-month total. The owner/operator shall calculate a new 12-month total by the twentieth day of each month using data from the previous 12 months. Records of consumption, production, and generator engine hours shall be kept on a monthly basis, for all periods when the plant is in operation. Records of consumption, production and generator engine hours including rolling 12-month totals, shall be made available to the Executive Secretary or Executive Secretary's representative upon request. Natural gas consumption shall be determined by examination of natural gas billing records for the plant. Graphite production shall be determined by examination of plant production records. Resin and curing agent consumption shall be determined by examination of material purchasing records and building production records. Emergency generator engine hours of operation shall be determined by examination of maintenance records, which shall be kept on site.

11. Diesel fueled power generator engines shall be used for electricity producing operation only during the periods when electric power from the public utilities is interrupted, for regular maintenance of the generators, or during periodic maintenance of the company owned electrical substation.
12. The requirements of R307-327, UAC, shall apply to all storage tanks at the site used for storage of applicable volatile organic compounds (VOC), unless more effective emissions control devices are specified for particular storage tanks.
13. The residence time within the various furnaces or fume incinerators shall be demonstrated using the following equation:

$$R = Vol/Q$$

Where,

R = residence time in seconds

$Vol = \text{inside volume of the incinerator} - Ft^3$

$Q = \text{maximum exhaust gas flow rate} - Ft^3/\text{second}$

14. Fume incinerator temperatures shall be monitored with temperature sensing equipment that is capable of continuous measurement and readout of the combustion temperature. The readout shall be located such that an inspector/operator can at any time safely read the output. The measurement shall be accurate within $\pm 25^\circ F$ at operating temperature. The measurement need not be continuously recorded. All instruments shall be calibrated against a primary standard at least once every 180 days. The calibration procedure shall be in accordance with 40 CFR 60, Appendix A, Method 2, paragraph 6.3, and 10.31, or use a type "K" thermocouple.
15. All thermal oxidation, fume incinerators shall be operated at the following parameters (unless as indicated in condition 33-SS, 33-YY & 33-FFF):
 - A. At a minimum temperature of 1,400 °F
 - B. At a minimum residence time of 0.5 seconds
16. All high temperature carbonization furnaces shall utilize a dedicated burner box at each furnace entrance. Each burner box shall be equipped with pilot lights to ensure that combustion occurs.
17. Emissions from all low temperature carbonization furnaces shall be routed to, and combusted within a dedicated fume incinerator in each case before being discharged to the atmosphere.
18. Emissions from all solvent coating towers shall be routed to, and combusted within a thermal oxidation fume incinerator in each case before being discharged to the atmosphere.
19. Emissions from all mixing vessels vapor collection systems, and portable container cleaning vapor collection systems shall be routed to, and combusted within a thermal oxidation fume incinerator, or flare device in each case before being discharged to the atmosphere.
20. The fume incinerator exhaust stacks need not be constructed to accommodate gravimetric stack testing. However, if the Executive Secretary determines a stack test is necessary, whatever modifications needed to meet 40 CFR 60, Appendix A, Method 1, and to provide OSHA approvable access to the test location, shall be retrofitted to the emission point.
21. All effluent stack/vents for process emissions from carbon fiber production shall have wire mesh filters to control broken carbon filaments, except those stacks vented to the fume incinerators, high temperature furnace outlet stacks, end chamber stacks on the oxidation ovens and surface treatment stacks.

Roads and Fugitive Dust

22. Hexcel Corporation shall abide by all applicable requirements of UAC R307-309 for PM_{10} non-attainment areas (Salt Lake County) for Fugitive Emission and Fugitive Dust sources.

To be in compliance, Hexcel must operate in accordance with the most current version of R307-309.

23. The in-plant access roads and parking lots shall be paved, except for some power supply right-of way access, and shall be periodically swept or sprayed clean as dry conditions warrant or as determined necessary by the Executive Secretary. Records of cleaning paved roads shall be made available to the Executive Secretary or the Executive Secretary's representative upon request.

Fuels

24. The owner/operator shall use only natural gas as primary fuel for all fuel burning HVAC units, furnaces, burner boxes, solvent coating – drying towers, miscellaneous ovens, and boilers. Process off-gas may be used to supplement the operation of any of these devices in which such fuel would be compatible. This condition does not apply to steam, or electrically powered units.
25. The owner/operator shall use vapor recovery system off-gas as primary fuel, and natural gas as supplemental fuel for all thermal oxidation fume incinerators attached to the solvent coating – drying towers.

Federal Limitations and Requirements

26. In addition to the requirements of this AO, all applicable provisions of 40 CFR 60.18 (Control Device Requirements for Flares) applies to this installation.
27. In addition to the requirements of this AO, all applicable provisions of the National Emission Standards for Hazardous Air Pollutants for Source Categories, 40 CFR 63, Subpart A, 40 CFR 63.1 to 63.15 (General Provisions), Subpart SS, 40 CFR 63.980 to 63.999 (National Emission Standard for Closed Vent Systems, Control Devices, Recovery Devices and Routing to a Fuel Gas System or a Process), and Subpart HHHHH, 40 CFR 63.7980 to 63.8105 (National Emission Standard for Miscellaneous Coating Manufacturing) apply to this installation.

Volatile Organic Compound (VOC) and Hazardous Air Pollutants (HAPs) Limitations

28. The facility shall abide by all applicable requirements of UAC R307-325, and R307-335 for VOC sources located in an ozone Maintenance area, or any of the applicable requirements of 40 CFR 63.8055 whichever is most stringent. To be in compliance, this facility must operate in accordance with the most current version of UAC R307-325 and R307-335 or the applicable section(s), if renumbered.
29. The emissions from all plant-wide operations shall not exceed:

29.00 tons per rolling 12-month period for VOCs (non-HAP)
11.67 tons per rolling 12-month period for Methyl Ethyl Ketone
40.00 tons per rolling 12-month period for Cyanide
542.48 tons per rolling 12-month period for Methylene Chloride
6.50 tons per rolling 12-month period combined for all HAPs listed below: Xylene, Toluene, Di-Meth-Formamide, and Glycol Ethers

Compliance with each limitation shall be determined on a rolling 12-month total. Based on the twentieth day of each month, a new 12-month total shall be calculated using data from the previous 12 months.

The VOC, or HAP emissions shall be determined by maintaining a record of VOC, or HAP emitting materials used each month. The record shall include the following data for each material used:

- A. Name of the VOC, or HAPs emitting material, such as: paint, adhesive, solvent, thinner, reducers, chemical compounds, toxics, isocyanates, etc.
- B. Density of each material used (pounds per gallon)
- C. Percent by weight of all VOC, or HAP in each material used
- D. Gallons of each VOC, or HAP emitting material used
- E. The amount of VOC, or HAP emitted monthly by each material used shall be calculated by the following procedure:

$$\text{VOC} = \frac{\% \text{ VOC by Weight}}{(100)} \times \frac{[\text{Density (lb)}]}{(\text{gal})} \times \text{Gal Consumed} \times \frac{1 \text{ ton}}{2000 \text{ lb}}$$

$$\text{HAP} = \frac{\% \text{ HAP by Weight}}{(100)} \times \frac{[\text{Density (lb)}]}{(\text{gal})} \times \text{Gal Consumed} \times \frac{1 \text{ ton}}{2000 \text{ lb}}$$

- F. The amount of VOC, or HAP emitted monthly from all materials used.
- G. The amount of VOCs, or HAPs reclaimed for the month shall be similarly quantified and subtracted from the quantities calculated above to provide the monthly total VOC, or HAP emissions.
- H. Non-HAP VOC emissions from the fuel burning devices (products of incomplete combustion generated by the boilers, curing ovens, generators, and etc.) are included in the above total.

Records & Miscellaneous

30. At all times, including periods of startup, shutdown, and malfunction, owners and operators shall, to the extent practicable, maintain and operate any equipment approved under this Approval Order including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Executive Secretary which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the source. All maintenance performed on equipment authorized by this AO shall be recorded.
31. The owner/operator shall comply with R307-150 Series. Inventories, Testing and Monitoring.

32. The owner/operator shall comply with R307-107. General Requirements: Unavoidable Breakdowns.
33. Information regarding all previously approved, installed, and operating equipment is listed below, combined with any new equipment items, and a description of each building in which the equipment items are located. Emissions from any of the buildings shall be included in the emissions inventory.

The six (6) buildings listed below have been evaluated and determined to have sufficient potential emissions to require an AO:

Building 2344 - Graphite fiber production, Lines #2, & #3
 Building 2436 - Graphite fiber production, Lines #4 & #5
 Building 2478 - Solvent coating and resin prep and handling
 Building 2479 - Graphite fiber production, Lines #6 & #7
 Building 2480 - Graphite fiber production, Line #8 NEW
 Building 8162 - R & D facility with an incinerator

The five (5) buildings listed below have been evaluated and determined to either have no emissions, or negligible emissions:

Building 8249 - Office/change house - northwest of building 2479
 Nitrogen Plant - Electrically powered nitrogen plant
 Building 8132 - Old facilities
 Building 8187 - Lab hood and curing oven
 Building 2422 - Administration building - HVAC units

BUILDING-2344 - GRAPHITE FIBER PRODUCTION, LINES #2, & #3

- A. Graphite Fiber Line #2 with:
 1. Two (2) - Electrically heated, oxidation ovens
 2. One (1) - Electrically heated, low temperature, carbonization furnace
 3. One (1) - Electrically heated, high temperature, carbonization furnace
 4. Surface treatment operations
 5. Fiber sizing operations
 6. Spooling operations
- B. Graphite Fiber Line #3 with:
 1. Three (3) - Electrically heated, oxidation ovens
 2. One (1) - Electrically heated, low temperature, carbonization furnace
 3. One (1) - Electrically heated, high temperature, carbonization furnace
 4. Surface treatment operations
 5. Fiber sizing operations
 6. Spooling operations.
- C. Two (2) - John Zink systems, thermal oxidation, fume incinerators, rated at 750,000 Btu/hr - each
- D. Three (3) - standby emergency generators
 1. One @ 250 kW, diesel fueled
 2. One @ 125 kW, diesel fueled
 3. One @ 45 kW, natural gas fueled
- E. **Four (4) - 2,500 gallon tanks (either empty or containing water)

BUILDING - 2436 - GRAPHITE FIBER PRODUCTION, LINES #4 & #5

- F. Graphite fiber line #4 with:
 - 1. Four (4) - Electrically heated, oxidation ovens
 - 2. One (1) - Electrically heated, low temperature, carbonization furnace
 - 3. One (1) - Electrically heated, high temperature, carbonization furnace
 - 4. Surface treatment operations
 - 5. Fiber sizing operations
 - 6. Spooling operations
- G. Graphite fiber line #5 with:
 - 1. Four (4) - Natural gas fueled, oxidation ovens with two - 2,500,000 Btu/hr burners per each oven
 - 2. One (1) - electrically heated, low temperature carbonization furnace
 - 3. One (1) - electrically heated-high temperature carbonization furnace
 - 4. Surface treatment operations
 - 5. Fiber sizing operations
 - 6. Spooling operations
- H. Two (2) - John Zink, thermal oxidation, fume incinerators, rated at 2,000,000 Btu/hr - each
- I. One (1) - Boiler, rated at 6,300,000 Btu/hr.
- J. Two (2) - Diesel fueled, emergency generators
 - 1. One @ 180 kw
 - 2. One @ 200 kW
- K. **Four (4) - 2,500 gallon tanks (either empty or containing water)

BUILDING 2478 - SOLVENT COATING AND RESIN PREP AND HANDLING

- L. Four (4) - Solvent coaters with associated drying towers, each consisting of
 - 1. Creel area
 - 2. Solvated resin dip pan tank & metering room
 - 3. Vertical drying oven
 - 4. Spooling operations
- M. One (1) - Smith Engineering, thermal oxidation, fume incinerator, rated at 13,000,000 Btu/hr, with one (1) - attached auxiliary heater for returning heated air to the associated drying tower, rated at 3,000,000 Btu/hr.
- N. Two (2) - Thermal oxidation, fume incinerators, rated at 9,500,000 Btu/hr - each
- O. One (1) - Resin warming oven
- P. One (1) - Calcining oven
- Q. One (1) - Blue M electrically heated drying oven
- R. One (1) - Muffle furnace
- S. Two (2) - Roof top furnaces, rated at 177,000 Btu/hr each
- T. One (1) - Resin filmer, and resin extruder
- U. One (1) - Resin extruder
- V. One (1) - Cyclone solids mover with a cyclone separator
- W. One (1) - 8551-7 resin mixing system
- X. One (1) - Solvent-jet, container cleaning system
- Y. Solvated resin mixing system
 - 1. One (1) - five (5) gallon mixing vessel
 - 2. One (1) - 25 gallon mixing vessel
 - 3. One (1) - 50 gallon mixing vessel
 - 4. One (1) - 100 gallon mixing vessel
 - 5. One (1) - 250 gallon mixing vessel

6. One (1) - 300 gallon mixing vessel
 7. Four (4) - Pole mounted, blade/propeller type mixers
 8. One (1) - Planetary motion type mixer
 9. One (1) - 50 gallon reactor vessel
 10. One (1) - 1,100 gallon reactor vessel
- Z. Assorted tanks:
1. One (1) - 6,000 gallon storage tank
 2. Five (5) - 300 gallon solvated mix storage tanks
 3. Four (4) - 4,000 gallon process tanks
 4. Eight (8) - 2,500 gallon process tanks
 5. ** Miscellaneous portable stainless steel containers of various capacity (50 to 600 gallons)
- AA. Solvent vapor hood
- BB. Mixing vessel, and portable container vapor collection system (sealing lids with vacuum pressure, venturi type, vapor capture)
- CC. Laboratory fume hood and test oven
- DD. Two (2) - 300 kW diesel fueled, emergency generators
- EE. **Water based epoxy resin coating may be used in addition to the solvent based coating.
- FF. The approved installations/processes for the resin preparation and handling shall consist of the following:
1. Cleaning of the resin mixers shall be done using Butyrolactone (BLO), or M-Pyrol (NMP) aqueous based solvent, or methyl ethyl ketone. Waste contaminated wiping materials shall be placed in a covered container and disposed in a manner that prevents volatilized solvent from being emitted into the atmosphere. Portable containers shall be cleaned using the solvent-jet cleaning device listed in condition 33-X above, or by hand. The solvent-jet cleaning device will be attached to the vapor collection system listed in condition 33-BB above.
 2. The Young conveying system shall transfer powdered curing agents to the hopper. The hopper shall discharge through a feeder into the continuous mixer as a closed system.
- GG. All comfort heat sources shall be electrically powered or steam powered from existing plant services.

BUILDING - 2479 - GRAPHITE FIBER PRODUCTION, LINES #6 & #7

- HH. Eight (8) - low temperature, natural gas fueled, oxidation ovens, with two (2) - burners, rated at 2,500,000 Btu/hr, per each oven.
- II. One (1) - low temperature, nitrogen purged carbonization furnace, with two (2) - natural gas fueled exhaust ports that pre-combust the VOC prior to the fume incinerator.
- JJ. One (1) - John Zink fume incinerator, rated at 300,000 Btu/hr
- KK. One (1) - high temperature, nitrogen purged carbonization furnace, with one (1) - burner box at the furnace entrance.
- LL. **The finishing area shall have water based wash baths:
1. Ammonium bicarbonate wash bath
 2. Water wash baths
- MM. The finishing area shall have a steam heated drum for aqueous based sizing drying.

- NN. One (1) - electrically heated, low temperature, nitrogen purged carbonization furnace with two (2) - attached natural gas fueled, exhaust ports that pre-combust the VOC prior to the fume incinerator.
- OO. One (1) - electrically heated, high temperature, nitrogen purged carbonization furnace with one (1) - burner box at the furnace entrance.
- PP. **Three (3) - water based wash baths:
1. One (1) - ammonium-bicarbonate wash bath
 2. Two (2) - water wash baths
- QQ. The following tanks:
1. One (1) - 5,000 gallon storage tank
 2. One (1) - 5,000 gallon sizing storage tank
 3. One (1) - 300 gallon sizing mixing tank
- Each tank, except the sizing-mixing tank, shall have submerged fill to prevent volatilization during filling of the tank. Each of these tanks shall contain sizing, or pre-discharge water (prior to filling with the intended material).
- RR. Three (3) - diesel fueled, emergency generators
1. One (1) - 100 kW
 2. One (1) - 250 kW
 3. One (1) - 400 kW
- SS. One (1) - McGill, Inc. fume incinerator, rated at 750,000 Btu/hr
1. This fume incinerator exhaust stack shall be monitored with oxygen content sensing equipment that is capable of continuous measurement and readout of the oxygen content within the stack. The readout shall be located such that an inspector/operator can at any time safely read the output. The measurement shall be accurate within $\pm 5\%$ of full scale (0 to 10% scale) at operating conditions. The measurement need not be continuously recorded. All instruments shall be calibrated as per manufacturer's standard at least once every 180 days.
 2. The following operating parameters for the incinerator shall be maintained within the indicated ranges:
 - a. The incinerator shall be operated with a minimum residence time of 1.0 second at the maximum temperature and flow rate.
 - b. Temperature - 1,400°F minimum to 1,700°F maximum
 - c. Percent excess O_2 - 6 % minimum on Fiberline 7
- TT. The sizing process on line #6 shall use either an aqueous base solvent, or a VOC based solvent using only methylene chloride
- UU. **Line #7 sizing process uses only aqueous based solvents.

BUILDING - 2480 - GRAPHITE FIBER PRODUCTION, LINE #8

- VV. Four (4) - low temperature, natural gas fueled, oxidation ovens, with two (2) - burners, rated at 1,000,000 Btu/hr, per each oven.
- WW. One (1) - low temperature, nitrogen purged carbonization furnace, with two (2) - natural gas fueled exhaust ports that pre-combust the VOC prior to the fume incinerator.
- XX. One (1) - high temperature, nitrogen purged carbonization furnace, with one (1) - burner box at the furnace entrance.
- YY. One (1) - John Zink fume incinerator, rated at 3,000,000 Btu/hr
1. This fume incinerator exhaust stack shall be monitored with oxygen content sensing equipment that is capable of continuous measurement and readout of the oxygen content within the stack. The readout shall be

located such that an inspector/operator can at any time safely read the output. The measurement shall be accurate within $\pm 5\%$ of full scale (0 to 10% scale) at operating conditions. The measurement need not be continuously recorded. All instruments shall be calibrated as per manufacturer's standard at least once every 180 days.

2. The following operating parameters for the incinerator shall be maintained within the indicated ranges:

- a. The incinerator shall be operated with a minimum residence time of 1.0 second at the maximum temperature and flow rate.
- b. Temperature - 1,400°F minimum to 1,700°F maximum
- c. Percent excess O_2 - 6 % minimum

ZZ. **Three (3) - water based wash baths:

1. One (1) - ammonium-bicarbonate wash bath
2. Two (2) - water wash baths

AAA. One (1) - 400 kW diesel fueled, emergency generator

BBB. Surface treatment operations

CCC. Fiber sizing operations

DDD. Spooling operations

BUILDING - 8162 R & D FACILITY FOR NEW PROCESSES

EEE. A pilot scale fiber line with various ovens, furnaces, and process as necessary for research and development purposes, and production of specialty materials.

FFF. John Zink, or McGill, fume incinerator system rated at 750,000 BTU/hr with a 3:1 shutdown ratio capability.

1. This fume incinerator exhaust stack shall be monitored with oxygen content sensing equipment that is capable of continuous measurement and readout of the oxygen content within the stack. The readout shall be located such that an inspector/operator can at any time safely read the output. The measurement shall be accurate within $\pm 5\%$ of full scale (0 to 10% scale) at operating conditions. The measurement need not be continuously recorded. All instruments shall be calibrated as per manufacturer's standard at least once every 180 days.

2. The following operating parameters for the incinerator shall be maintained within the indicated ranges:

- a. The incinerator shall be operated with a minimum residence time of 1.0 second at the maximum temperature and flow rate.
- b. Temperature - 1,400°F minimum to 1,700°F maximum
- c. Percent excess O_2 - 6 % minimum

GGG. The facility shall be used only for new fiber products development, new manufacturing processes development, and specialty materials production.

HHH. Any surface treatment or sizing performed on the fibers produced shall be water based, except for the use of no more than 200 lb of VOC solvents per year. If the 200 lb quantity should ever be exceeded, the emissions shall be directed to an approved emissions control device.

** This equipment is listed for informational purposes only.

The Executive Secretary shall be notified in writing if the company is sold or changes its name.

This AO in no way releases the owner or operator from any liability for compliance with all other applicable federal, state, and local regulations including R307.

A copy of the rules, regulations and/or attachments addressed in this AO may be obtained by contacting the Division of Air Quality. The Utah Administrative Code R307 rules used by DAQ, the Notice of Intent (NOI) guide, and other air quality documents and forms may also be obtained on the Internet at the following web site:

<http://www.airquality.utah.gov/>

The annual emission estimations below include point source and fugitive emissions, and do not include fugitive dust, road dust, tail pipe emissions, and grandfathered emissions. These emissions are for the purpose of determining the applicability of Prevention of Significant Deterioration, non-attainment area, Maintenance area, Title V source requirements of the R307, and State Implementation Plan (Salt Lake County) limits.

The Potential To Emit (PTE) emissions for the Hexcel Fiber plant are currently calculated at the following values:

	<u>Pollutant</u>	<u>Tons/yr</u>
A.	PM ₁₀	71.16
B.	NO _x	112.49
C.	SO ₂	11.08
D.	CO	32.82
E.	VOC (non-HAP)	29.00
F.	HAPs	
	Total HAPs	600.45

The Division of Air Quality is authorized to charge a fee for reimbursement of the actual costs incurred in the issuance of an AO. An invoice will follow upon issuance of the final Approval Order.

Sincerely,

Rusty Ruby, Manager
New Source Review Section

TBA

CLEARING INDEX



State of Utah

Department of
Environmental Quality

Dianne R. Nielson, Ph.D.
Executive Director

DIVISION OF AIR QUALITY
Richard W. Sprott
Director

ION M. HUNTSMAN, JR.
Governor

GARY HERBERT
Lieutenant Governor

DAQ-033-2005

MEMORANDUM

TO: Utah Air Quality Board

THROUGH: Richard W. Sprott, Executive Secretary

THROUGH: Cheryl Heying, Planning Branch Manager

THROUGH: Brock LeBaron, Technical Analysis Branch Manager

FROM: Tyler Cruickshank, Technical Analysis Meteorologist

DATE: May 23, 2005

SUBJECT: Propose for Public Comment: Amend R307-101-2, Definition of "Clearing Index"

Summary:

Division of Air Quality staff seek to amend Utah's definition of Clearing Index in order to meet the following objectives:

- 1) to minimize open burn air quality impacts;
- 2) to maximize open burn opportunities for interested parties, when appropriate;
- 3) to allow for automated dissemination of the Clearing Index; and
- 4) to remove operational inconsistencies.

The objectives will be met by allowing the National Weather Service (NWS) to provide Clearing Index forecasts that utilize their advanced technology and meteorological expertise.

Background:

In the early 1970's, the NWS began formulating a clearing index product for DAQ's open burn rule requirements. The clearing index is a measure of the expected rate of clearing of near surface pollutants. This product consists of a daily clearing index forecast for 3 pre-defined "air basins" within the state. The pre-defined air basins represent eastern Utah lowlands, western Utah lowlands, and all land above 6000 ft. The clearing index forecasts were originally developed using the best technology that was available to the NWS at that time.

In a pre-internet era, the AMC assumed responsibility for distributing the NWS clearing indices to all interested parties by facsimile and on a pre-recorded telephone message. Today, the AMC continues to support the open burn rule requirements by providing the daily NWS clearing index values via facsimile, recorded telephone message, and on the daily air quality Internet report.

Certain approval orders include conditions that certain activities such as shutdowns for maintenance or open burning be conducted only when the clearing index is at a certain level; these conditions will be unchanged by the change in the definition.

Technological Developments:

The NWS has developed an advanced forecast system that produces clearing index forecasts for 2.5-kilometer square grids across the entire state of Utah. The system generates highly specific forecasts for all locations within the state. A user-friendly Internet interface has been built that enables the public to view forecasts for their location at the click of the mouse. The site will not be operational until the rule change is approved; DAQ staff will demonstrate it at the Board meeting.

The gridded forecast system provides superior clearing index data compared with the original 3-basin system. On many occasions, it is likely that the new clearing indices would increase the number of days that meet the Open Burn rule requirements. For example, in the western Utah lowlands, clearing indices for the St. George area of southwest Utah will no longer be affected by the typical low clearing indices experienced in the Great Salt Lake Basin to the north. The gridded system provides true representations of expected clearing indices in a given area.

Customer Consultation:

In late March, DAQ Clearing Index customers were presented with proposed changes to the Clearing Index system. DAQ requested feedback that included potential problems with the new technology. No negative feedback was received.

Staff Recommendations:

DAQ recommends that the Board propose for public comment the attached revision in R307-101-2 to replace the 3 air basin clearing index with the technologically advanced NWS gridded forecast system clearing indices.

Clearing index customers should access the clearing index through the NWS web interface.

1 R307. Environmental Quality, Air Quality.
2 R307-101. General Requirements.
3 R307-101-2. Definitions.

4 ...
5 "Clean Coal Technology Demonstration Project" means a
6 project using funds appropriated under the heading
7 "Department of Energy-Clean Coal Technology," up to a total
8 amount of \$2,500,000,000 for commercial demonstration of
9 clean coal technology, or similar projects funded through
10 appropriations for the Environmental Protection Agency.
11 The Federal contribution for a qualifying project shall be
12 at least 20 percent of the total cost of the demonstration
13 project.

14 "Clearing Index" means an indicator of the predicted
15 rate of clearance of ground level pollutants from a given
16 area. This number is ~~[calculated]~~ provided by the National
17 Weather Service. ~~[from daily measurements of temperature~~
18 ~~lapse rates and wind speeds from ground level to 10,000~~
19 ~~feet. The State has been divided into three separate air~~
20 ~~quality areas for purposes of the clearing index system:~~
21 ~~— (1) Area 1 includes those valleys below 6500 feet~~
22 ~~above sea level and west of the Wasatch Mountain Range and~~
23 ~~extending south through the Wasatch and Aquarius Plateaus~~
24 ~~to the Arizona border. Included are the Salt Lake, Utah,~~
25 ~~Skull and Escalante Valleys and valleys of the Sevier River~~
26 ~~Drainage.~~

27 ~~— (2) Area 2 includes those valleys below 6500 feet~~
28 ~~above sea level and east of the Wasatch Mountain Range.~~
29 ~~Included are Cache Valley, the Uintah Basin, Castle Valley~~
30 ~~and valleys of the Green, Colorado, and San Juan Rivers.~~
31 ~~— (3) Area 3 includes all valleys and areas above 6500~~
32 ~~feet above sea level.]~~

33 "Commence" as applied to construction of a major
34 source or major modification means that the owner or
35 operator has all necessary pre-construction approvals or
36 permits and either has:

37 (1) Begun, or caused to begin, a continuous program
38 of actual on-site construction of the source, to be
39 completed within a reasonable time; or

40 (2) Entered into binding agreements or contractual
41 obligations, which cannot be canceled or modified without
42 substantial loss to the owner or operator, to undertake a
43 program of actual construction of the source to be
44 completed within a reasonable time.

45 ...

46 KEY: air pollution, definitions
47 2005

19-2-104

INFORMATION ITEMS



State of Utah

Department of
Environmental Quality

Dianne R. Nielson, Ph.D.
Executive Director

DIVISION OF AIR QUALITY
Richard W. Sprott
Director

JON M. HUNTSMAN, JR.
Governor

GARY HERBERT
Lieutenant Governor

DAQC-808-2005

MEMORANDUM

TO: Air Quality Board
FROM: Richard W. Sprott, Executive Secretary
DATE: May 10, 2005
SUBJECT: Compliance Activities – April 2005

Annual Inspections Conducted:

A.....10
SM.....6
B.....13

Initial Compliance Inspections Conducted:

A.....2
SM.....1
B.....4

On-Site stack test audits conducted:.....2
Stack test report reviews:22

On-site CEM audits conducted:0
Emission reports reviewed:0

Oxy fuels inspections conducted:.....0

¹Miscellaneous inspections conducted.....24

Complaints received:	9
VOC inspections:	
Tankers	0
Degreasers	5
Paint Booths	8
Source Compliance Action Notice issued	1
Notices of Violation issued	1
Compliance Advisories issued	3
Settlement Agreements resolved	1
Penalties Collected	\$2,757.60

Notices of Violations issued:

Geneva Rock Products, Inc.

Compliance Advisories issued:

Hill Air Force Base
 Roadway Express, Inc.
 Levelor Home Fashions, Inc.
 Salt Lake City Department of Public Utilities

Settlement Agreements Reached:

GlobeGround North America, LLC

\$2,757.60

¹Miscellaneous inspections include, e.g., surveillance, level I inspections, complaints, on-site training, tanker vapor certifications, dust patrol, smoke patrol, open burning, etc.



State of Utah

Department of
Environmental Quality

Dianne R. Nielson, Ph.D.
Executive Director

DIVISION OF AIR QUALITY
Richard W. Sprott
Director

JON M. HUNTSMAN, JR.
Governor

GARY HERBERT
Lieutenant Governor

MEMORANDUM

TO: Utah Air Quality Board

FROM: Richard W. Sprott, Executive Secretary

DATE: May 18, 2005

SUBJECT: Hazardous Air Pollutant Section Compliance Activities – April 2005

DAQH-0442-05

4/05

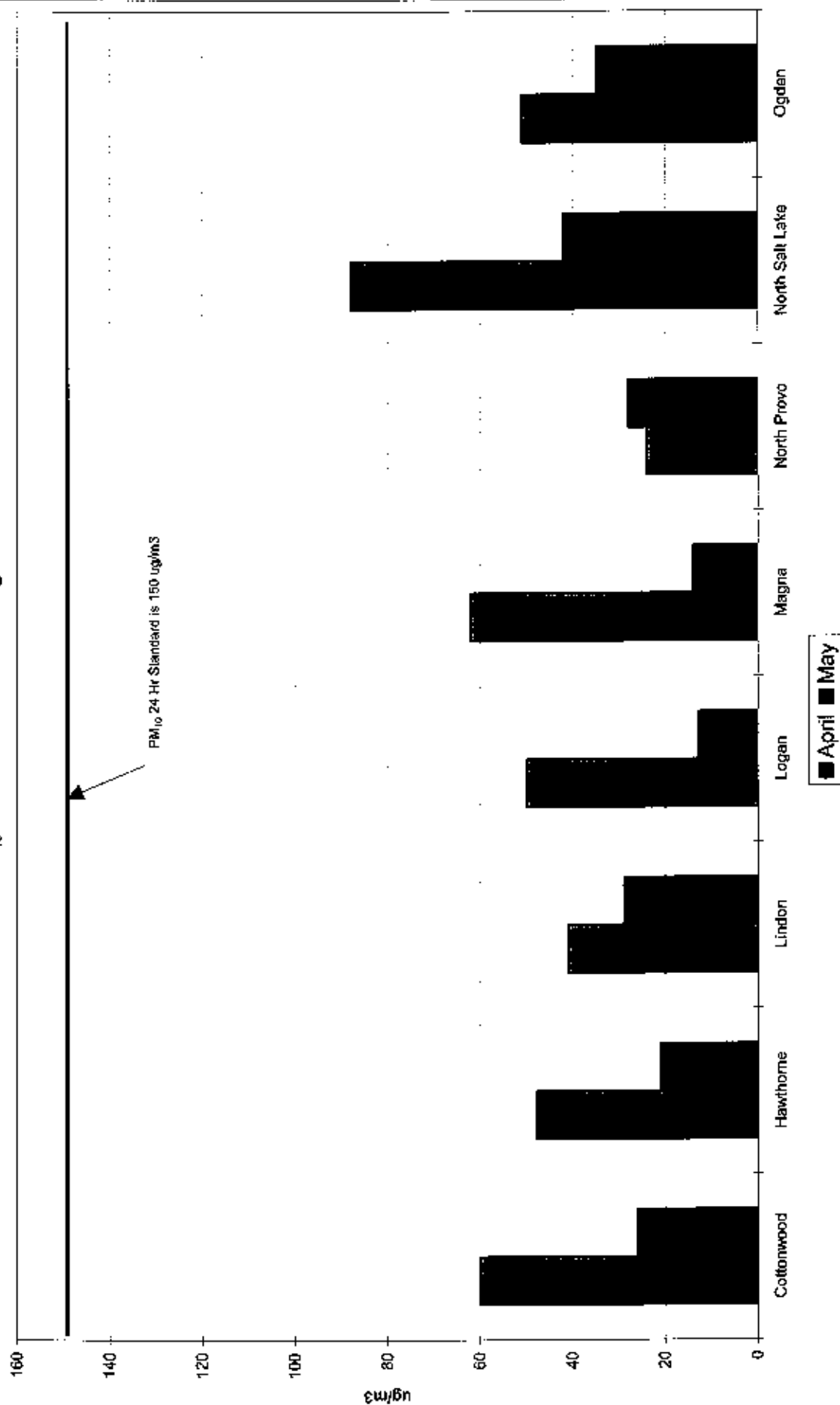
Asbestos Demolition/Renovation Inspections	14
Asbestos in School Inspections	1
MACT Compliance Inspections	13
Other NESHAP Inspections	0
State Rules (Only) Inspections	0
Asbestos Notifications Accepted	85
Asbestos Phone Calls Answered	428
Asbestos Individuals Certifications: Approved/Disapproved	114/0
Company Certifications/Re-certifications	1/0
Alternate Asbestos Work Practices: Approved/Disapproved	6/0
Lead Based Paint (LBP) Inspections	6
LBP Notifications Approved	1

LBP Phone Calls Answered	100
LBP Letters prepared and mailed	43
LBP Courses Reviewed/Approved	0/0
LBP Course Audits	4
LBP Certifications Approved/Disapproved	15/0
LBP Company Certifications	2
Notices of Violation Issued	0
Notices of Noncompliance (NON)	0
Compliance Advisories Issued	0
SCANS (warning letters) Issued	1
Settlement Agreements Finalized	3
Penalties Agree to	\$64,648

Settlement Agreement:	Phil Winston Construction \$ 3,226.25
	AMEC 14, 718.75
	General Growth Properties 46,703.13

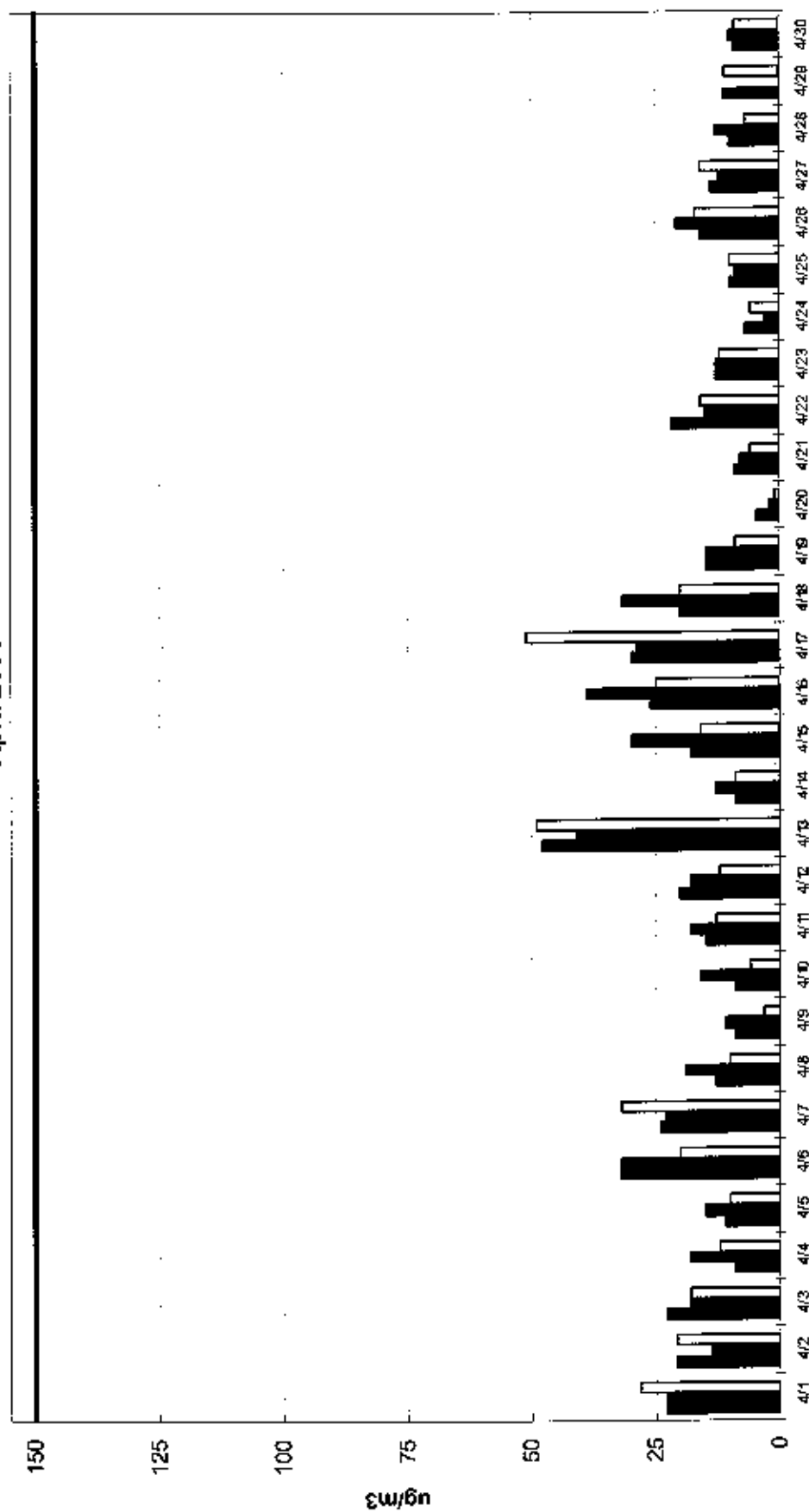
Highest PM₁₀ Concentration for April-May 2005

PM₁₀ 24 hour Standard is 150 ug/m³



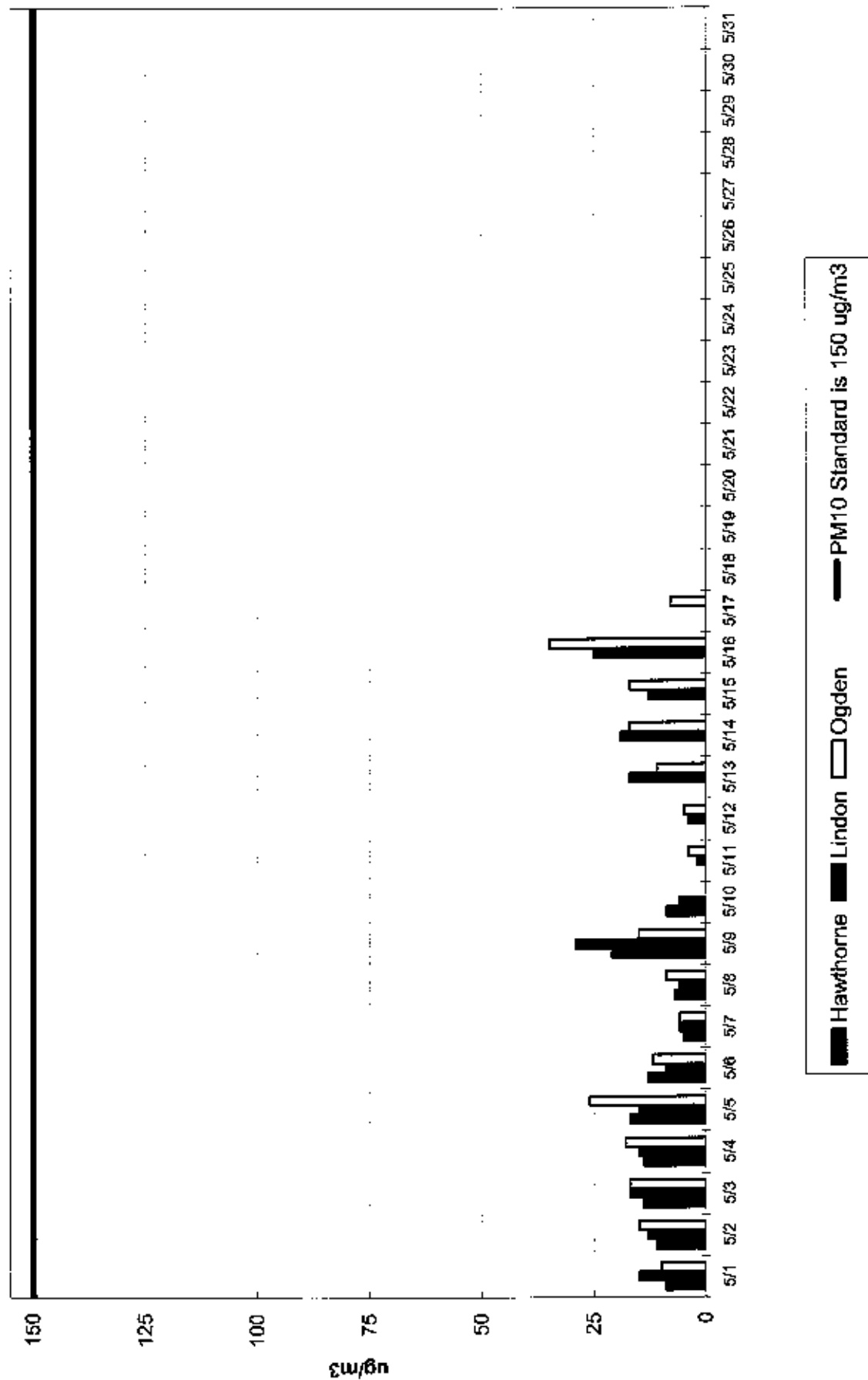
PM₁₀ Filter at Hawthorne, Lindon, & Ogden

April 2005

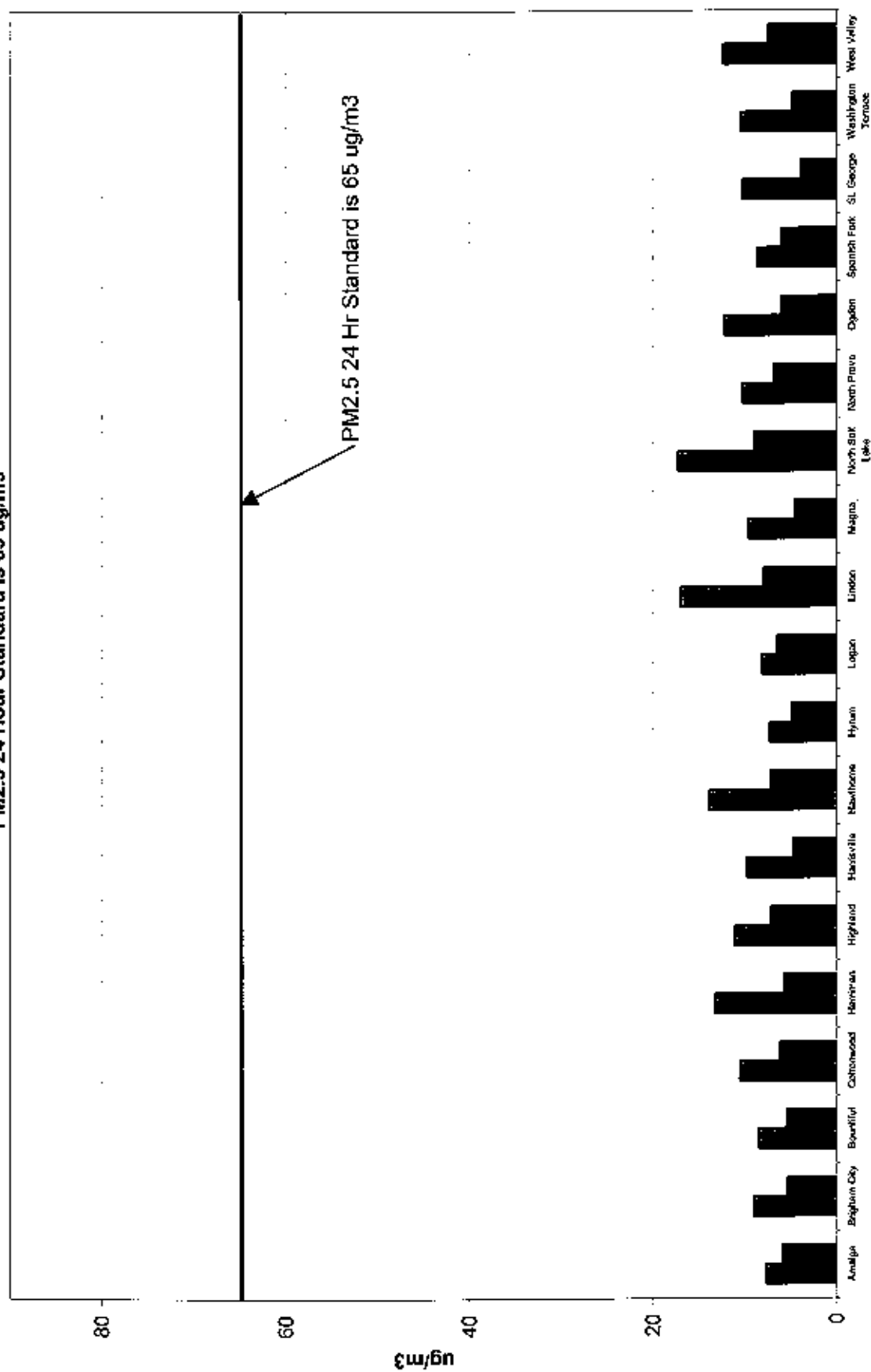


Hawthorne
 Lindon
 Ogden
 PM10 Standard is 150 $\mu\text{g}/\text{m}^3$

PM₁₀ Filter at Hawthorne, Lindon, & Ogden May 2005



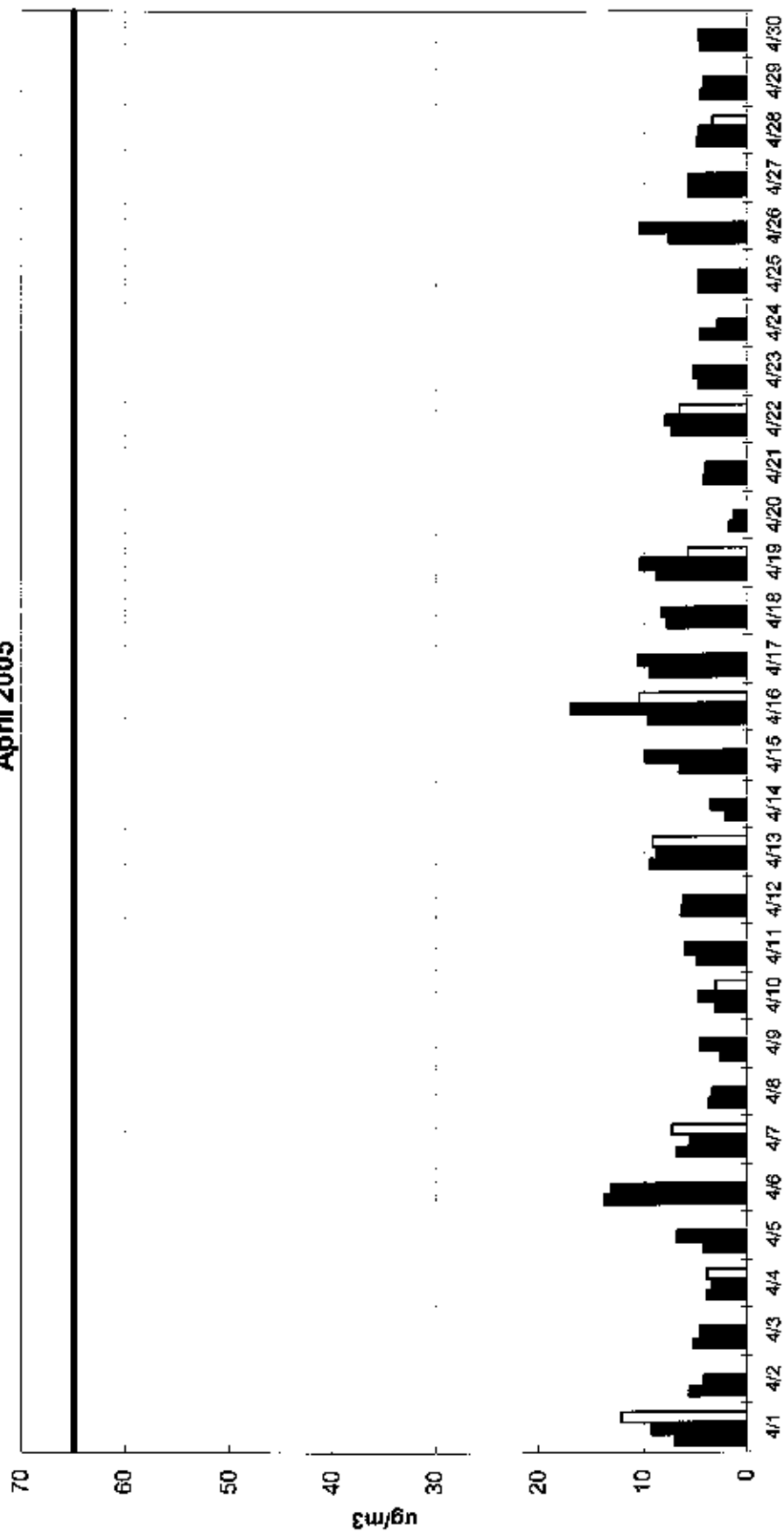
Highest PM2.5 Concentration for April-May 2005 PM2.5 24 Hr Standard is 65 ug/m3



■ April ■ May

PM_{2.5} Filter at Hawthorne, Lindon, & Ogden

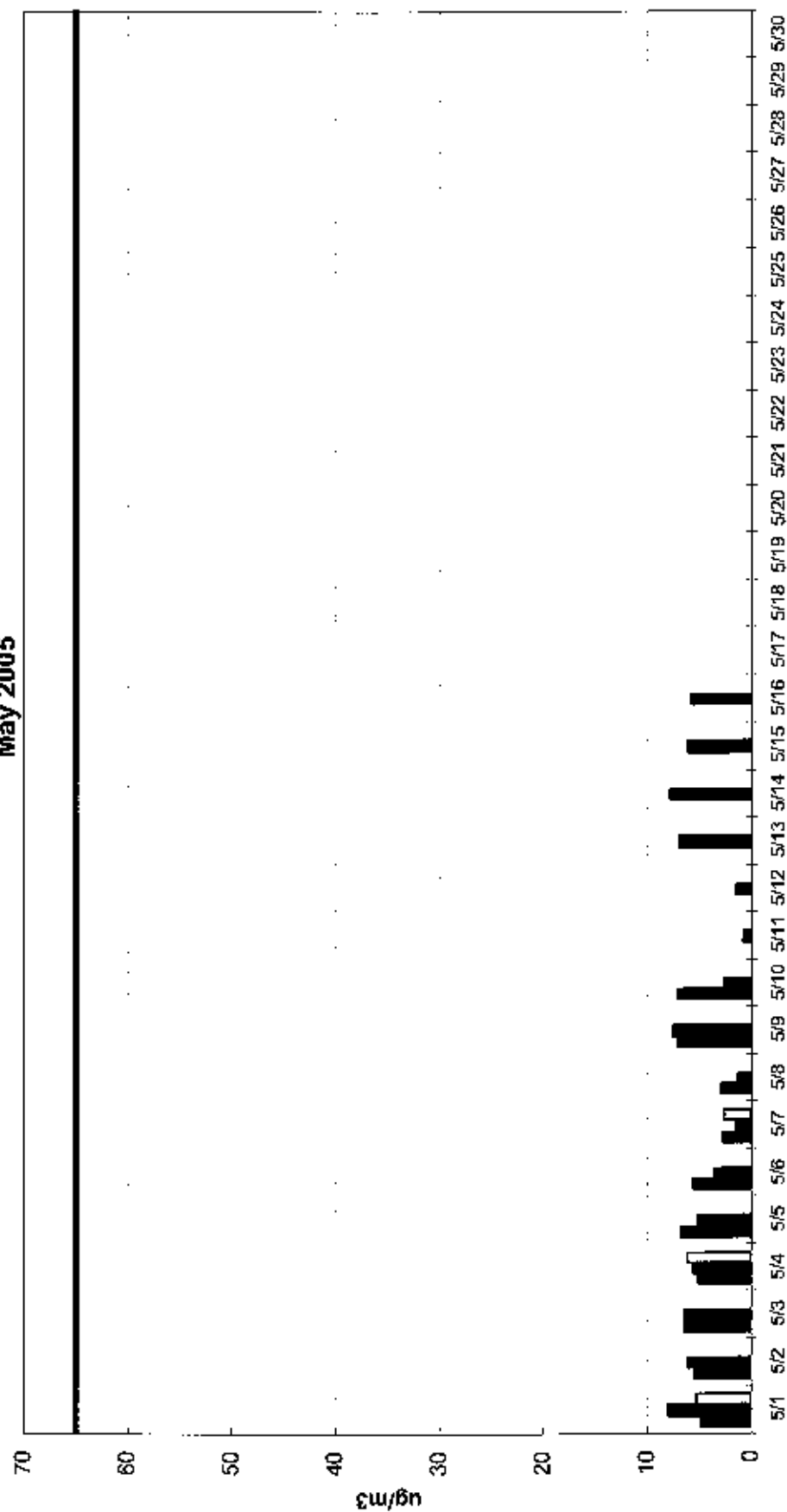
April 2005



Hawthorne
 Lindon
 Ogden
 PM_{2.5} Standard is 65 ug/m³

PM_{2.5} Filter at Hawthorne, Lindon, & Ogden

May 2005



Hawthorne
 Lindon
 Ogden
 PM_{2.5} Standard is 65 $\mu\text{g}/\text{m}^3$

UTAH STATE DIVISION OF AIR QUALITY

47mm Particulate PM10 Concentration Adjusted to Sea Level (24-hr average) in Micrograms per Cubic Meter

2005 April

Date	Cottonwood	Hawthorn	Unden	Logan 4	Magna(W)	Moab	NProvo	NProvo-X	NSL	NSL-X	Ogden2
04/01	14	23	23	14	7		17		33		28
04/02		21	14						33		21
04/03		23	18						30		18
04/04	6	9	18	4	22		12		18	20	12
04/05		11	15						16		10
04/06		32	32						45		20
04/07	24	24	23	33	35		15		39		32
04/08		13	19						16		10
04/09		9	11						10		3
04/10	10	9	16	10	8		12	10	9	8	6
04/11		15	18						25		13
04/12		20	18						31		12
04/13	60	48	41	50	62				88		49
04/14		9	13						22		9
04/15		18	30						31		16
04/16	24	25	39	16	21		24	24	35	38	25
04/17		30	29						37		51
04/18		20	32						43		20
04/19	14	15	15	13	27		13		15		9
04/20		5	2						13		1
04/21		9	8						17		6
04/22	18	22	15	14	12		16	17	28	31	16
04/23		13	13						19		12
04/24		7	3						14		6
04/25	12	10	9	15	4		7		17		10
04/26		16	21						24		17
04/27		14	12						26		16
04/28	10	10	13	12	23		11	11	25	28	7
04/29		11							15		11
04/30		9	10						15		9
<hr/>											
Arith Mean	19	17	18	18	21		14	15	26	25	16
Max 24-hr Avg	60	48	41	50	62		24	24	88	38	51
Std. Dev	15	9	10	13	17		5	7	15	11	12
Days of Data	10	30	29	10	11		9	4	30	5	31
Days >150											
Yearly Avg	28	25	25	27	21		20	21	38	44	24

UTAH STATE DIVISION OF AIR QUALITY

47mm Partisol: PM10 Concentration Adjusted to Sea Level (24-hr average) in Micrograms per Cubic Meter

2005 May

Date	Cottonwood	Hawthorn	London	Logan 4	Hager(N)	Hoob	MProw	MProw-X	KSL	KSL-X	Open2
05/01	13	9	15	7	5		9		17		10
05/02		11	13						25		15
05/03		14	17						30		17
05/04	17	14	15	11	12		13	12	19	24	18
05/05		17	15						36		26
05/06		13	9						15		12
05/07	6	5	6	7	14		3		7		6
05/08		7	6						12		9
05/09		21	29						34		15
05/10	8	9	6	2			4	5	16	15	
05/11			2						9		4
05/12			4								5
05/13	15		17	13			13		20		11
05/14			19						27		17
05/15			13						19		17
05/16	25		25				28	28	42	50	35
05/17											8
05/18											
05/19											
05/20											
05/21											
05/22											
05/23											
05/24											
05/25											
05/26											
05/27											
05/28											
05/29											
05/30											
05/31											

Arith Mean	14	12	13	8	10		11	15	22	30	14
Max 24-hr Avg	25	21	29	13	14		28	28	42	50	35
Std. Dev	7	5	7	4	5		9	12	10	18	8
Days of Data	6	10	16	5	3		6	3	15	3	16
Days > 150											
Yearly Avg	28	25	25	27	21		20	21	38	44	24

UTAH STATE DIVISION OF AIR QUALITY

PM2.5 Actual Concentration (24-hr average) in Micrograms per Cubic Meter
2005 April

2005 April																								
Date	AG	BR	BV	CW	HE	HG	HV	HW	HY	L4	X4	LN	LC	MG	N2	NP	O2	SF	SW	WT	WX	WV	VX	
04/01	7.2	7.7	8.3	6.2	5.2	4.6	9.2	6.9	6.3	6.3		9.3		7.3	11.3	8.0	12.2	6.8	4.6	10.4		7.8		
04/02								5.5		7.1		4.3			8.7									
04/03								5.3		3.6		4.5			6.8									
04/04	2.2	2.3	3.2	3.7	3.8	9.3	3.2	3.9	2.7			3.4	3.3	3.3	5.3	3.6	3.8	3.5	5.0	3.2	3.4	4.2	4.7	
04/05								4.3				6.8			5.0									
04/06								13.8			4.1	13.1			17.3									
04/07	4.7	6.3	5.1	6.4	6.2	5.9	6.5	6.7	4.9	6.2	5.6	5.5		5.9	9.7	6.0	7.3	5.1	8.7	5.7			6.5	
04/08								3.7		2.6	2.3	3.3			4.7									
04/09								2.3		3.0	2.7	4.6			3.0									
04/10	2.7	2.7	3.0	3.0	2.3	3.1	2.5	3.0	3.1	4.0	3.5	4.7	5.3	2.5	3.1	5.3	3.0		2.9	2.8	3.6		2.7	
04/11								4.9		5.5	5.4	6.0			7.9									
04/12								6.0		5.5	5.8	6.3			9.7									
04/13	7.7	9.1	8.5	10.6	12.3	8.5	9.0	9.5	7.3	8.2	7.7	8.8		9.7	13.0	7.9	9.1	8.9	10.2	9.2			11.1	
04/14								2.2		2.5	2.1	3.5			5.3									
04/15								8.5		4.3	4.7	9.7			9.2									
04/16	5.2	6.2	7.7	9.4	11.2	11.1	9.8	9.5	5.0	6.5	6.2	17.0		7.5	13.0	10.2	10.4	8.7	9.4	8.8	9.1	12.3	12.4	
04/17								9.4		7.5	7.2	10.7			11.7									
04/18								7.7		3.7	3.5	8.3			10.5									
04/19	4.0	4.8	8.1		8.4	7.6	5.2	8.7	4.2	8.4	5.0	10.5		5.6	8.7	9.5	5.8	6.5	5.2	5.9			6.8	
04/20								1.8		2.0	1.4	1.1			4.0									
04/21								4.3		2.7	2.5	4.0			4.8									
04/22	3.7	3.7	4.8	6.4	4.9	5.3	4.0	3.7	4.5	6.5	4.0	8.0		5.2	10.2	6.5	6.5	4.5	7.4	5.9	5.5	7.4	7.3	
04/23								4.8		3.5	4.5	5.2			5.8									
04/24								4.6		3.3	3.5	2.8			4.4									
04/25	7.4	5.9	4.1	3.0	4.6	4.0	4.2	4.7	4.4	4.9	4.3	4.7		4.6	5.4	4.0		3.8	2.7				6.1	
04/26								7.6		6.5	5.7	10.4			9.5									
04/27								5.8		5.3	5.0	5.7			8.2									
04/28	1.2	2.2	4.5	5.8	4.6	4.2	2.7	4.9	1.5	2.1	2.0	4.7	4.9	4.4		4.6	3.4	5.0		3.2	3.2	6.1	5.1	
04/29								4.5		3.8	3.1	4.2			7.2									
04/30								4.5		3.8		4.8			5.5									
Arith Mean	4.6	5.0	5.7	6.2	6.5	5.8	5.6	5.8	4.4	4.6	4.3	6.5	4.5	5.6	7.9	6.6	6.8	5.8	6.2	6.1	5.0	7.6	6.4	
Max 24-hr Avg	7.7	9.1	8.5	10.6	12.3	11.1	9.8	13.9	7.3	8.2	7.7	17.0	5.3	9.7	17.3	10.3	12.2	8.7	10.2	10.4	9.1	12.3	12.4	
StdDev	2.3	2.4	2.2	2.5	3.5	2.6	2.8	2.6	1.7	1.7	1.7	3.4	1.1	2.2	3.4	2.3	3.2	1.9	2.8	2.8	2.5	2.6	3.7	
Days Data	10	10	10	9	10	10	10	30	10	28	24	30	3	10	29	20	9	9	9.0	9	5	9	5	
Yearly Mean	18.9	8.7	11.6	12.8	9.0	9.3	9.8	12.3	15.3	15.0	13.6	10.8	10.1	9.9	15.2	10.4	11.9	8.5	7.3	10.1	10.4	12.0	11.2	

UTAH STATE DIVISION OF AIR QUALITY

PM2.5 Actual Concentration (24-hr average) In Micrograms per Cubic Meter

	2005 May																						
Date	AG	BR	BV	CW	HE	HG	HV	HW	HY	L4	X4	UN	LX	MG	N2	NP	O2	SF	SW	WT	WX	VW	VX
05/01	4.1	4.9	5.0	6.2	5.8	7.2	4.7	4.8	4.9	5.8	5.0	8.0		4.6	4.3	6.0	5.4	5.2	3.9	4.8			
05/02								5.5		6.1	5.7	6.2			6.5								
05/03								6.5		6.5	5.6	6.5			8.4								
05/04	3.9		5.5	5.7	4.2	5.4		5.2	3.3	4.3	3.7	5.6	5.8	4.1	6.3	5.8	6.1	5.1		4.6	4.6	7.5	5.3
05/05								6.8			4.6	5.2			7.3								
05/06								5.7		4.5	8.8	3.7			6.4								
05/07			2.3	1.9	1.1	1.4	4.5	2.9	1.8	2.5	2.2	1.5		1.7	3.3	2.0	2.7	1.7		2.5		2.7	
05/08								3.8		3.1	3.0	1.4			4.0								
05/09								7.1		4.4	3.4	7.7			8.6								
05/10	1.3	1.1	3.4	4.2	2.9	1.5		7.2	1.5	1.7	1.3	2.7	3.3		6.0	3.3		3.0				3.9	3.4
05/11										1.1	1.6	0.8			3.3								
05/12										1.7	1.2	1.5			3.7								
05/13		2.9	3.9	5.6	4.8	4.9			3.0	3.9	3.9	7.0			7.5	5.9		6.0					
05/14										6.3	6.2	7.8			8.9			2.0					
05/15										6.0	6.0	6.2			7.6			2.3					
05/16	5.9	5.4		5.8		5.4			4.9			5.9	6.4		9.0	6.9		5.3					
05/17																							
05/18																							
05/19																							
05/20																							
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05/24																							
05/25																							
05/26																							
05/27																							
05/28																							
05/29																							
05/30																							
05/31																							

Arith Mean	3.8	3.6	4.0	4.9	3.8	4.3	4.6	5.6	3.2	4.1	4.1	4.9	5.2	3.5	6.5	5.0	4.7	4.4	3.9	4.0	4.6	4.7	4.3
Max 24-hr Avg	5.9	5.4	5.5	6.2	5.8	7.2	4.7	7.2	4.9	6.5	8.8	8.0	6.4	4.6	9.0	6.9	6.1	6.0	3.9	4.8	4.6	7.5	5.3
Std.Dev	1.9	2.0	1.3	1.6	1.8	2.3	0.1	1.8	1.5	1.9	2.1	2.5	1.6	1.5	2.1	1.9	1.8	1.6		1.2		2.5	1.3
Days Data	4	4	5	6	5	6	2	10	6	14	15	16	3	3	17	6	3	6	1.0	3	1	3	2
Yearly Mean	17.6	8.5	11.2	12.3	8.7	9.0	9.7	12.0	13.6	14.4	13.0	10.4	9.8	9.7	14.4	10.0	11.7	8.3	7.3	9.9	10.3	12.3	10.9